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THE PRACTICE

OF THE

COMMISSARY COURTS IN SCOTLAND.

THE PRACTICE

OF THE

COMMISSARY COURTS IN SCOTLAND.

WITH

AN APPENDIX

CONTAINING ACTS OF PARLIAMENT AND SEDERUNT,
PRACTICAL FORMS, ETC.

BY

WILLIAM ALEXANDER,

WRITER TO HER MAJESTY'S SIGNET,
PRINCIPAL CLERK AND REGISTRAR OF THE COMMISSARY COURT OF EDINBURGH,
AUTHOR OF ABRIDGMENTS OF THE ACTS OF THE PARLIAMENTS OF SCOTLAND,
AND OF THE ACTS OF SEDERUNT OF THE LORDS OF COUNCIL AND SESSION,
ETC. ETC.

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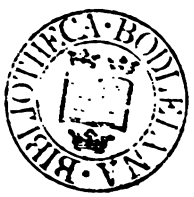

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TO

John Thomson Gordon, Esquire,

SHERIFF AND COMMISSARY OF THE COUNTY OF MID-LOTHIAN,

IN GRATEFUL ACKNOWLEDGMENT

OF THE KINDNESS AND ENCOURAGEMENT

RECEIVED FROM HIM BY THE AUTHOR IN THE DISCHARGE

OF HIS OFFICIAL DUTIES,

THIS WORK

IS RESPECTFULLY DEDICATED.

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THE PRACTICE

OF THE

COMMISSARY COURTS IN SCOTLAND.

CHAPTER I.

HISTORY, CONSTITUTION, JURISDICTION, &c., OF THE COMMISSARY COURTS IN SCOTLAND.

THE Commissary Court of Edinburgh, consisting of four judges, was established by Queen Mary, by a royal grant, dated February 8, 1563. Inferior commissaries were appointed, under a commission from James VI., in the principal towns in Scotland. The Commissary Court of Edinburgh possessed a diocesan jurisdiction over the counties of Edinburgh, Haddington, Linlithgow, Peebles, and a part of Stirlingshire, and had also a more extended jurisdiction, by which it decerned and confirmed executors to persons who died domiciled furth of Scotland, or who died in Scotland without a fixed domicile, having personal property within Scotland. The Edinburgh Court had also the power of review of the decrees and proceedings of the inferior commissaries throughout Scotland. The commissaries of Edinburgh had a privative jurisdiction in all matters properly consistorial, *e.g.*, in declarators of marriage, actions of adherence and divorce, the confirmation of testaments, &c., also in questions of slander and defamation, within the boundaries, and of the parties, above mentioned. Inferior commissaries had no jurisdiction in such consistorial

causes as were, from their importance or intricacy, proper to the Commissariot of Edinburgh, such as actions of divorce and declarators of marriage. The commissaries had also a cumulative jurisdiction with other judges ordinary in actions of aliment against husbands, actions for sealing up repositories, actions for verbal injuries arising from hasty words, the authenticating of tutorial and curatorial inventories, and civil actions in absence to the extent of £40 Scots, and to a greater amount, if the jurisdiction was prorogated by consent of parties. Not only bonds, contracts, and other deeds which contained a clause of registration in the books of any judge competent, but protests of bills, without reference to the value or amount, might competently be registered in the Commissary Court books; but this right of registration was taken away from the commissaries by 49th Geo. III. cap. 42, § 2.

A great change was made on the Commissary Courts in Scotland by the Act 4th Geo. IV. cap. 97; which abolished the twenty-three inferior commissariots which then existed, and vested their jurisdiction in the sheriffs of the different counties in Scotland—the county composing the commissariot,—in place of the diocesan boundaries that formerly prevailed. Among other important provisions in the act, the small debt jurisdiction of the commissaries was abolished, the proceedings of the sheriff commissaries were declared reviewable by the Court of Session only, the office of principal clerk of the Commissary Court of Edinburgh, whose jurisdiction continued to extend over the three Lothians, was abolished, and two clerks substituted—the one appointed by the Crown, and the other by the clerk so appointed, who is responsible for his depute; and in other commissariots the crown was authorised to appoint a commissary clerk, performing his duties in person, and who might either be the sheriff-clerk of the county or not.

History, &c., of the Commissary Courts in Scotland.

By the Judicature Act, 1st Will. IV. cap. 69, the counties of Haddington and Linlithgow were taken from the commissariot of Edinburgh, and declared to constitute separate commissariots. All actions of declarator of marriage, of nullity of marriage, and all actions of declarator of legitimacy, and of bastardy, and all actions of divorce, and all actions of separation *a mensa et thoro*, were declared competent only before the Court of Session; and provision was made for the abolition of the Commissary Court of Edinburgh as a separate court, as vacancies occurred in the offices of the judges. This was carried into effect by the 6th and 7th Will. IV. cap. 41 (1836), whereby the whole remaining powers and jurisdiction of the court were transferred to the sheriff of the county of Edinburgh, except in so far as regarded taking proofs in consistorial causes before the Court of Session, which were appointed to be taken by sheriffs to be named for that purpose. The jurisdiction of the court was still further abridged by the Act 13th and 14th Vict. cap. 36 (1850), which transferred actions of adherence, and all other consistorial actions, to the Court of Session.

Finally, by the Statute 21st and 22d Vict. cap. 56, entituled "An Act to amend the Law relating to the Confirma- "tion of Executors in *Scotland*, and to extend over all parts of "the United Kingdom the effect of such confirmation, and of "Grants of Probate and Administration," (23d July 1858), the ancient form of decerning executors in cases of intestacy, &c., was abolished, and petitions to the commissary substituted—the mode of publication of such applications assimilated to that in the case of petitions for the service of heirs, viz., through the medium of the record of edictal citations—the form of testaments-dative and testaments-testamentar simplified—and a Scotch confirmation declared capable of including and transfer-

ring personal estate in England or Ireland, thereby superseding the necessity, which had been long felt as a grievance, of executors expeding probate or letters of administration in those parts of the United Kingdom, if the deceased left personal estate there, as well as taking out confirmation in Scotland. Reciprocal effect was given to English and Irish probates and letters of administration in Scotland. It is much to be regretted that this Act, the main features of which were suggested in a bill printed and circulated by the author of this treatise, was altered in several particulars by the Lord Advocate, Mr. Inglis, without any communication with the author, and that no opportunity was afforded him of making suggestions for further improvements, which his official experience had suggested to him.

The jurisdiction now left to the Commissary Courts in Scotland is limited to decerning and confirming executors to deceased persons having personal property in Scotland, and relative incidental matters, such as applications for the protection of the property of the deceased till an executor is confirmed, the exoneration of executors and their cautioners, applications for restriction of caution, and the appointment of factors for minors *quoad* executry funds.

Practically, the business of the Commissary Court of Edinburgh, and, it is believed, that of other Commissary Courts in Scotland, is conducted by the principal commissary clerk and his depute, without reference to the judge, except in decerning executors to persons dying intestate, without having nominated executors, findings respecting domicile under the 9th section of the recent Act, granting restriction of caution, or where there are conflicting or questionable applications for confirmation, and that the parties are dissatisfied with the opinion of the commissary clerk.

Practitioners before the Commissary Courts in Scotland.

PRACTITIONERS before the COMMISSARY COURT of EDINBURGH.

In order to ascertain the extent of exclusive privilege claimed by the Society of Solicitors at Law, the author addressed the following letter to their Preses:—"Commissary Office, Edinburgh, "25th October 1858.—Sir, Being engaged in a work, arising "out of the Confirmation of Executors' Act of last Session, in "which I wish to state what parties are entitled to practise as "agents in the Commissary Court of Edinburgh in cases of "testate and intestate succession, I beg to be informed what "exclusive rights are claimed by the Society of Solicitors at "Law, and upon what authority. Your early answer will be "obliging.—I am, &c." (Signed) "W. ALEXANDER. MAURICE "LOTHIAN, Esq., Preses, Society of Solicitors at Law."

To this letter the following answer was received:—"51 Albany Street, Edinburgh, 27th October 1858.—Dear Sir, "Mr. Lothian has handed your letter of 25th current to me, "as Fiscal to the Incorporated Society of Solicitors at Law. "In answer, I have to state that the Society possesses the "exclusive privilege of practising in the Commissary Court of "Edinburgh in all cases, embracing those of testate and intestate succession.

"I think you may most easily obtain full information on "the subject of the Society's rights, by referring to the case of "Macandrew and Others *v.* Solicitors at Law, 28th June 1833, "xi. Sh. & D., p. 806.—I am," &c. (Signed) "WM. SAUNDERS, "Fiscal, Society Solicitors at Law. WM. ALEXANDER, Esq., "Commissary Office, Edinburgh."

The exclusive privilege claimed in the letter quoted appears subject to limitation; because first, the statute 6th and 7th Will. IV. cap. 41, § 3, (28th July 1836), passed after the decision

Practitioners before the Commissary Courts in Scotland.

in 1833 referred to, enacts—"That it shall be lawful for all "agents duly qualified to practise as such before the Court of "Session, to practise as agents in the Sheriff Court of Edin- "burgh, in so far as relates to any of the proceedings which are "transferred by this act to the Sheriff, in the same manner and "to the same extent as they might have practised in respect of "such matters in the Commissary Court before the passing of "this act." And second, by the practice of the Court any party or law-agent may lodge an inventory of a personal estate, with the relative testamentary writing, and get out confirmation without the intervention of a solicitor at law; and that in the case of intestate succession the services of a solicitor at law are not required after a decree-dative has been pronounced, either in the way of finding caution, lodging an inventory, or expeding a testament-dative.

The Commissary of Edinburgh, on considering a petition (*Nimmo*) for the appointment of an executor under the new act signed by a Writer to the Signet, as agent for the petitioner, pronounced the following interlocutor:—"*Edinburgh*, 2*d Decem-* "*ber* 1858.—The Commissary, in respect that the petition is "not signed either by the party or by an agent authorised to "practise in the Commissary Court dismisses the said petition "as incompetent."

This has been followed by an instruction to the Commissary Clerk "to refuse to receive any petition or pleading which shall "not be signed by the party, or by a solicitor at law."

PRACTITIONERS before INFERIOR COMMISSARIOTS.

Persons qualified to act as agents before the Sheriff Court of each county are the persons who practise before the Sheriff, *qua* Commissary.

What are Heritable, and what are Moveable Rights.

CHAPTER II.

WHAT ARE HERITABLE, AND WHAT ARE MOVEABLE RIGHTS.

IN the practice of the Commissary Court, it is necessary for the agent to be well versed in the rules of Succession, both to heritable and moveable property, in cases of intestacy.

The right of succession depends, in the first place, upon whether the property left by the defunct is heritable or moveable.

Heritable property is composed of,— Heritable.

1. Land, and all rights in, or connected with land, minerals, lime, coal, or stone, in mines or quarries, and generally any subject which by nature is immoveable.

2. Buildings on land, fixtures in houses, mills, machines, or vessels, erected on a spot to which they are, while entire, immoveably fixed.

3. The growth of the soil, such as trees and natural fruits.

4. Heirship moveables, and other effects specially destined to the heir-at-law.

5. Debts secured upon land, or other heritable property, directly or by accession.

6. Rights having a tract of future time, such as liferents; also debts giving a periodical right without having relation to a capital sum or principal, such as an annuity. It has not been decided whether patent rights or copyright are heritable.

7. Titles of honour, and offices continuing after the holder's death.

8. The right of a party under a trust entitled to demand delivery or conveyance of a specific heritable subject.

What are Heritable, and what are Moveable Rights.

Heritable.

9. Feu-duties and casualties of superiority, rents of land, interest of heritable bonds and annuities, but not the arrears thereof.

10. Servitudes, teinds, patronages, reversions, faculties and rights to challenge deeds relating to heritage.

11. Personal bonds, excluding executors.

12. Sums directed to be laid out by trustees on heritable security.

The right to heritable subjects is regulated by the law of the country in which they are situated, not by that of the owner's domicile.

Moveable.

Moveable property, on the other hand, may be described generally as consisting of whatever moves itself, or can be moved without injury to itself or the subject with which it is connected; and whatever is not united to land. Specially, the following are moveable subjects or rights:—

1. Cash, plate, bullion, jewels, pictures, books, corns, cattle, instruments of tillage, household stuff, and goods of all kinds.

2. Stock in trade, ships.

3. A share in the stock of a trading company, even although heritable subjects form part of the stock.

4. Government and bank stock, railway shares, and debentures.

5. All debts not heritably secured, whether constituted by personal bond, bill, or open account.

6. A debt, though heritably secured, after a charge for payment.

7. The price of land sold.

8. The *jus crediti* under a trust, whereby the beneficiary is entitled merely to demand a sum of money, or share of the general trust-fund.

What are Heritable, and what are Moveable Rights.

9. Arrears of rent, feu-duties, interests, and annuities, in certain cases, and to a certain extent. Moveable.

Under this head it is necessary to attend, in the first place, to whether the lease or other instrument under which the rent, interest, or annuity is payable, was granted before or after the 16th June 1834, when the Act 4th Will. IV. cap. 22, commonly called the Apportionment Act, came into operation, as it does not alter the law in relation to rights acquired before that date.

With respect to rights to rents acquired before 16th June 1834, the following rules prevail:— Rights acquired *before* Apportionment Act.

1. In the case of an agricultural farm with a Martinmas entry, say at Martinmas 1830, with the rent payable in equal moieties, say at Whitsunday 1831, and Martinmas 1831, or any more postponed terms, the first half-year's rent for crop 1831 belongs to the heir-at-law, unless the proprietor survives Whitsunday 1831; and also the second half year's rent for crop 1831, unless the proprietor survives Martinmas of that year. Postponing the term of payment of the rent however much, does not alter the rule, but anticipation does, if the rent is *in bonis* of the proprietor before his death.

2. In grass farms, whether the rent is payable at the term of Martinmas after the tenant's entry, and the following Whitsunday, or in one sum at the Martinmas, if the proprietor survives Martinmas, the whole goes to his executors; if he dies before Martinmas, his executor gets only one-half of the rent.

3. In the case of house and other urban property, a different rule prevails from that in the case of land, the right to the rent being regulated, not by a crop, but by the legal terms of Whitsunday and Martinmas, the rent of the first half-year becoming part of the personal estate of the proprietor the moment the possession

Rights acquired *before* Apportionment Act.

begins. Thus, the executors of the proprietor of a house which a tenant enters at Whitsunday are entitled to the first half-year's rent if the proprietor survive Whitsunday, and to the second half-year's rent if he survive Martinmas.

Feu-duties vest in the executors of the superior only provided he survive the legal term of Martinmas or Whitsunday at which they are payable.

Rights acquired *after* Apportionment Act.

But if the leases or other instruments have been granted subsequent to 16th June 1834, a proportional part of the rent of lands, according to the time the proprietor may have survived the commencement of the period of possession, belongs to his executors. Thus, the executors of a proprietor dying on 1st April 1831, having a tenant who entered into possession at Martinmas 1830, are entitled to the proportion between Martinmas and 1st April of the first half-year's rent of crop 1831, although he has not survived Whitsunday 1831; and, in like manner, if the proprietor died on the 1st August 1831, his executors are entitled not only to the whole first half-year's rent of crop 1831, but to a part of the second half-year's rent, in the proportion that the period intervening between Whitsunday and 1st August 1831 bears to the rent from Whitsunday to Martinmas of that year.

The Apportionment Act enlarges the rights of executors under leases of grass farms granted after 16th June 1834, in the same proportion. Thus, where the grass farm is let from Martinmas 1830 to Martinmas 1831, or for the grass crop 1831, and the landlord dies on 1st July 1831, his executors receive the rent in the proportion that the period from Martinmas 1830 to 1st July 1831 bears to the whole year.

The executors of the owners of feu-duties are, under the Apportionment Act, entitled to a share of the half-year's feu-duty

current at the death in proportion to his survivance, provided the feu rights were granted prior to 16th June 1834. Rights acquired *after* Apportionment Act.

The current term's interests of heritable bonds, granted subsequent to 16th June 1834, are under the Apportionment Act divisible between the heir and executors in proportion to the time the creditor survives the current term. Thus, an heritable creditor dying on 1st August, his executors are entitled to the interest from the 15th May preceding.

Annuities and other rights having *tractum futuri temporis* appertained to the heir in heritage, if the periodical payment was termly, and the deceased had not survived the specified term, unless there was a special stipulation to pay daily and continually, but under the Apportionment Act executors are entitled to a rateable proportion of the annuity, or other annual payment, according to the time of survivance of the creditor.

Executors being, under the law that prevailed before the Apportionment Act, entitled to the whole half-year's rent of houses current at the date of the proprietor's death, had no interest to plead the Apportionment Act, but the reverse; and as the act was intended to improve the condition of executors, the executors of the proprietor of a house do not appear affected by the Apportionment Act. Hence, when a landlord of a house dies on 1st June, the claim of his executors is not restricted to a proportion of the rent from 15th May preceding, but they have right to the whole half-year's rent payable at Martinmas. Urban Subjects.

In illustration of the application to Scotland of the Apportionment Act, reference is made to the cases of Bridges *v.* Fordyce, 7th March 1844; Campbell *v.* Campbell, July 18, 1849; Blaikie *v.* Farquharson, July 18, 1849; Baillie *v.* Lockhart, 27th November 1852—Affirmed in House of Lords, 23d April 1855.

It must be kept in view, that various subjects and rights that are heritable *quoad* succession, must be attached by personal diligence, such as heirship moveables, and others made heritable *destinationê*, not of their own nature—and again, that certain rights, such as Bank of Scotland and Royal Bank Stock, which are attachable by adjudication only, the diligence applicable to heritable rights, are, notwithstanding, personal *quoad* succession.

For more minute information with respect to the distinction between heritable and moveable rights, reference is made to Erskine, book ii. tit. 2; Bell's Law Dict., *voce Heritable and Moveable;* Bell's Principles, 1470, *et seq.;* Bell's Illustrations, 1473, *et seq.;* and the authorities there mentioned.

ENGLISH ESTATE.

As Scotch confirmations are now applicable to personal estate in England and Ireland, it may be useful here to state generally what is considered personal estate, and transmitted by probate or letters of administration in these countries. The author, however, will not attempt to use any words of his own on the subject, but those of Mr. Williams, in his Treatise on the Law of Executors and Administrators, who says (5th Edition):—

"The general rule is, that all goods and chattels, real and "personal, go to the executor or administrator (p. 577).

"Chattels real are such as concern or savour of the reality; "or, in other words, they are chattel interests issuing out of, or "annexed to, real estate (p. 592).

"All leases and terms of land, tenements, and hereditaments "of a chattel quality, are chattels real, and will go to the execu-

English Estate.

" tor or administrator; but he has no interest in the freehold " terms or leases. The general rule for distinguishing these " two kinds is, that all interests for a shorter period than a life, " or more properly speaking, all interests for a *definite* space of " time measured by years, months, or days, are deemed chattel " interests; in other words, testamentary, and of the nature, " for the purposes of succession, of other chattels or personal " property (p. 595).

" With respect to the title of an executor or administrator " of a mortgagee to a mortgaged property, it is obvious, that at " law this will depend on the fact, whether the mortgage is in " fee, or for years; in the former case, the legal estate in the " land will descend to the heir, and the latter, it will go, like " any other term for years, to the executor. But with regard " to the money due upon the mortgage, it is now fully estab- " lished in equity, that, in every case, it is to be paid to the " executor or administrator of the mortgagee, by reason of the " rule of equity, that the satisfaction shall accrue to the fund " that sustained the loss (p. 608).

" Chattels personal are, properly and strictly speaking, " things *moveable*, which may be annexed to, or attendant on, " the person of the owner, and carried about with him from " one part of the world to another. Such are animals, house- " hold stuff, money, jewels, corn, garments, and every thing else " that can be properly put in motion, and transferred from place " to place. All these and other things of the same nature, " generally speaking, belong to the estate of the executor or " administrator " (p. 624).

For further particulars, reference is made to Mr. Williams' Treatise, part ii. book 2—" On the Quantity of the Estate in " possession of an Executor or Administrator."

CHAPTER III.

RULES OF SUCCESSION TO LANDS AND OTHER HERITAGES IN SCOTLAND.

THE right of succession to heritable or real estate in Scotland is regulated by the law of Scotland, and not by that of the country wherein the deceased proprietor resided — in other words, by the *lex loci*, not by that of the domicile of the defunct.

Descendants.

1. *Descendants.*—The preference is given to the *descendants* of the deceased. The eldest son and his issue succeed in the first place to the exclusion of all the other descendants. Failing him and his issue, the next eldest son and his issue succeed, and so in succession the other sons in the order of seniority, and their respective issue. The succession next opens to daughters, all the daughters succeeding equally, as *heirs portioners*, but with a privilege in favour of the eldest, that rights which from their nature are indivisible, for example, titles of dignity, fall to her alone as *præcipium*. In the succession of grandchildren, and other more remote descendants, males are still preferred before females, and the eldest male before the younger. The right of primogeniture, except in the case of daughters, therefore prevails to the fullest extent by the law of Scotland, and likewise the right of *representation* by which one succeeds to heritable subjects, not from any title in his own person, but in place of, and as representing, some of his deceased ancestors. Thus, where one dies leaving a younger son, and a grandchild, whether male or female, by an elder son predeceased, the grandchild, though farther removed in degree

from the deceased than his or her uncle, excludes him from the legal succession.

2. *Collaterals.*—Where there are no descendants, *collaterals* possess the right of succession in the next place, in a certain order, varying according to circumstances, and it must be observed that the right of representation above referred to obtains in the succession of collaterals as well as in that of descendants, and that when brothers or sisters are mentioned, not only the persons themselves are meant, but also their respective descendants, *jure repræsentationis.* In fixing who is the collateral heir, a distinction is drawn between the full blood and the half blood unfavourable to the latter. Males are preferred to females in the same degree of propinquity. The succession is not divided among more individuals than one, except in the special cases to be immediately explained. According to the rule, *heritage descends*, the brother-german (that is, by the same father and mother) next youngest to the deceased succeeds to him as heir-at-law. When the deceased has no younger brother, the succession goes to his immediate elder brother, not, should there happen to be three or more brothers, to the eldest of all; because where there is no room for heritage to descend, which is its natural course, it is the least deviation from the rule that it ascend, not *per saltum*, but by the slowest degrees. If there are no brothers-german, the sisters-german of the deceased succeed equally as heirs-portioners in preference to brothers consanguinean, *i. e.*, by the father only, for even a sister by the full blood excludes a brother by the half blood. In default of sisters-german, brothers consanguinean succeed, one after another, in the same order as brothers-german; and in default of these also, the sisters consanguinean take equally as heirs-portioners. Brothers or sisters of the deceased by the mother only, who are

Collaterals.

called *uterine*, are by the law of Scotland incapable of succession in heritage, which is indeed the case of all cognates, *i. e.*, relations of the deceased by the mother.

Ascendants.

3. *Ascendants.*—If the deceased leave neither child, brother, nor sister, nor issue of their bodies, the succession mounts upward to the father, as the only ascendant in the first degree capable to succeed, for the mother, though an ascendant in the same degree, is incapable of succeeding to her child. If the father be already dead, the succession goes to the father's brothers, and in default of them, to his sisters in the order above explained in reference to collateral succession. On the failure of uncles and aunts and their issue, the succession ascends to the paternal grandfather, and if he be also dead, to his brothers and sisters, and so upwards, as far as propinquity can be traced.* Where there is no agnate or kinsman to the deceased by the father, the Crown succeeds as *ultimus hæres.*

Conquest.

4. *Conquest.*—It is material to observe, that in the succession of collaterals, a different rule from that above stated prevails, if the deceased is a *middle* brother, and if the property has not been *inherited* but acquired or *conquest* by him. On his death, his heritable property by inheritance will descend, as already mentioned, to his immediate younger brother; but his estate by conquest will ascend to his immediate elder brother. Where the deceased is a younger brother, his immediate elder brother succeeds to all the heritable property, whether inherited or conquest, and if the deceased be an elder brother, his immediate younger brother gets both the heritage and conquest. In fixing the heir of conquest, brothers and sisters german are preferred to brothers and sisters consanguinean. There is no

* From the expression of Erskine, book iii. tit. 8, § 9, there is an ambiguity about this.

place for the distinction between heritage and conquest, where the succession divides among sisters.

5. *Terce.*—A widow is entitled to the liferent of one-third of the heritage (not burgage) in which her husband died infeft, provided the marriage has subsisted for year and day, or has produced a living child. Terce.

6. *Courtesy.*—A surviving husband is, on the other hand, entitled to the liferent of all the heritage (including burgage) in which his deceased wife died infeft, as heir to her predecessors, provided there shall have been a living child born of the marriage, and that such child be the mother's heir. Courtesy.

CHAPTER IV.

RULES OF SUCCESSION IN MOVEABLES.

GREAT changes were made on the law of Scotland in regard to the succession to intestate moveable or personal property, first by the Act 4th Geo. IV. cap. 98, entituled, "An Act for the "better granting of Confirmations in Scotland," (19th July 1823), and latterly by the Act 18th Vict. cap. 23, entituled, "An "Act to alter in certain respects the Law of Intestate Move- "able Succession in Scotland," (25th May 1855).

Law prior to 1823.

In reference to this subject, it is necessary to attend to the general law of Europe—that the order of succession to moveables does not depend on the *lex rei sitæ*, or where the moveable subject or fund happens to be, but is regulated by the law of the country in which the owner had his domicile at the time of his death. The following statements are made on the footing of the defunct having died domiciled in Scotland.

Previously to the above statutes, the right of succession to the moveable or personal estate of a deceased person belonged, as in the case of heritage, to descendants in the first place, failing them, collaterals, and lastly, ascendants. All who were alive at the time of the death of the party, and who stood in the same degree of relationship to him by the full blood, were admitted equally, without distinction of males and females. The right of primogeniture, and the right of representation to a next of kin deceased, had no place. The heir in heritage, however, was excluded from any share of the personal succession, unless he collated and agreed to throw the heritage into the common fund. The children of a first marriage had no preference over those of a

Rules of Succession in Moveables.

second marriage; but in the collateral succession to a deceased brother or sister, the full blood excluded the half blood. Law prior to 1823.

Dissolution of the marriage by the death of either of the parties within year and day made void all grants in consideration thereof. The tocher returned to the wife or her representatives, and all her interest in her husband's estate, by the disposition of law or otherwise, returned to the husband and his heirs. Year and Day.

Under the law, as administered previous to 1823, if a next of kin died before confirmation, his right lapsed, although he had survived the party whose estate was concerned; but this defect in the law was remedied by the Act 4th Geo. IV. cap. 98, which enacted that "in all cases of intestate succession, where "any person or persons who, at the period of the death of the "intestate, being next of kin, shall die before confirmation be "expede, the right of such next of kin shall transmit to his or "her representatives, so that confirmation may and shall be "granted to such representatives in the same manner as con-"firmations might have been granted to such next of kin "immediately upon the death of such intestate."* Succession made to vest by Survivance without Confirmation.

That, however, was a very minor change in the law compared with the enactments of the Statute 18th Vict. cap. 23,

* The privilege conferred on the representative of a next of kin to obtain confirmation *per saltum* under the Act 4th Geo. IV. cap. 98, does not interfere with the right of the Inland Revenue to call upon the representative of the next of kin to file an inventory of the personal estate of such next of kin, including his share of the succession of the original defunct. Thus, supposing A dies survived by B as his next of kin, and that C as the representative of B, gives up an inventory and expedes confirmation of A's personal estate, whereby he may obtain possession thereof, C has still to give up an inventory of B's personal estate, although it may be wholly composed of his right of succession to A, and to pay inventory and residue duty thereon.

Representation of Predecessors established.

establishing the right of representation in moveable succession, and making other alterations on the previous law.

By that statute, § 1, it is enacted, that "In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, or of any descendant of such child or children, who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children or of such issue, if he had survived the intestate, would have been entitled."

Under this enactment, supposing a father A dies, survived by a son and daughter, B and C, having had a son D, and a daughter E who predeceased him, the children, or in the event of *their* death, the grandchildren of D and E would succeed to a share of A's personal estate at his death, in the same manner that D and E themselves would have done had they survived their father. When the lives of the next of kin and of their issue that may have fallen are numerous, considerable difficulty will be found in working out the enactment in practice, and in distinguishing when the divisions fall to be made *per capita* or *per stirpes*. Some very unexpected results may be produced.

Limitation in case of Collaterals.

The leading enactment is, however, subjected to a limitation with respect to the right of representation, from the same section providing "that no representation shall be admitted among collaterals after brothers' and sisters' descendants."

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Limitation in case of Collaterals.

This is most ambiguous, as any attempt to answer the following actual case will demonstrate:—A died intestate without issue. He had two brothers, B and C, and a sister, D, all of whom predeceased him, the latter without leaving issue. B had a son E, who survived A. C had two daughters, F and G, one of whom F, survived A, the other, G, had predeceased him, leaving a son, H, who survived A, and a daughter I, who predeceased him, leaving two sons, K and L, who were alive at A's decease. *Query*, 1st, Who of the parties named would have right to a share in the distribution of A's estate, and in what proportions? and 2d, Has a limitation to descendants of collaterals any restrictive effect at all? The bill brought into the House of Lords by Lord Campbell in 1843 limited the representation of collaterals to their *children*—which in the case given would clearly have excluded the grandnephew H, and the great-grandnephews K and L.

Collation.

It has been already stated that the heir in heritage was, by our old law, excluded from any share of the personal estate unless he collated; and following out this principle, the Act 18th Vict. cap. 23, § 2, enacts, that "Where the person pre-"deceasing would have been the heir in heritage of an intestate "leaving heritable as well as moveable estate had he survived "such intestate, his child, being the heir in heritage of such "intestate, shall be entitled to collate the heritage to the effect "of claiming for himself alone, if there be no other issue of the "predeceasor, or for himself and the other issue of the prede-"ceasor, if there be such other issue, the share of the moveable "estate of the intestate which might have been claimed by the "predeceasor upon collation if he had survived the intestate; "and daughters of the predeceasor, being heirs-portioners of "the intestate, shall be entitled to collate to the like effect;

Collation. " and where, in the case aforesaid, the heir shall not collate, " his brothers and sisters, and their descendants in their place, " shall have right to a share of the moveable estate equal in " amount to the excess in value over the value of the heritage " of such share of the whole estate, heritable and moveable, as " their predeceasing parent had he survived the intestate would " have taken on collation."

Father. By our former law, ascendants had right to moveable property only in the case of failure of descendants and collaterals, that is to say, the issue or the brothers or sisters of a party deceasing had a preferable right to his father; but by the 18th Vict. cap. 23, § 3, it is enacted, that " Where any person " dying intestate shall predecease his father without leaving " issue, his father shall have right to one-half of his moveable " estate, in preference to any brothers or sisters or their descend- " ants who may have survived such intestate." Does the half vest without confirmation in the father by his survivance, and transmit to his heirs and successors? The words " in preference to " surely mean only " equally with ;" and what becomes of the *jus relictæ?*

Mother. Upon the same principle, the Act 18th Vict. cap. 23, § 4, enacts, that " Where an intestate dying without leaving issue, " whose father has predeceased him shall be survived by his " mother, she shall have right to one-third of his moveable " estate, in preference to his brothers and sisters or their de- " scendants, or other next of kin of such intestate." Does the third vest without confirmation in the mother by her survivance, and transmit to her heirs and successors? *Quære* also, as to meaning of " preference " conferred, and as to *jus relictæ.*

Uterine. Further, in abolition of the former law, by which there could be no succession through the mother, the Act 18th Vict.

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cap. 23, § 5, enacts, that "Where an intestate dying without "leaving issue, whose father and mother have both predeceased "him, shall not leave any brother or sister german or consan- "guinean, nor any descendant of a brother or sister-german or "consanguinean, but shall leave brothers and sisters uterine, or "a brother or sister uterine, or any descendant of a brother or "sister uterine, such brothers and sisters uterine and such "descendants in place of their predeceasing parent shall have "right to one-half of his moveable estate." Here, again, what becomes of the *jus relictæ?* Uterine.

The explication of this section of the Act will be most difficult, if not impossible, in practice.

Finally, the Statute 18th Vict. cap. 23, § 7, enacts, in abolition of the former law, that where a marriage shall be dissolved before the lapse of a year and day from its date by the death of one of the spouses, the whole rights of the survivor, and of the representatives of the predeceasor, shall be the same as if the marriage had subsisted for the period aforesaid. Year and Day.

So far as not altered by the Act 4th Geo. IV. cap. 98, and the Act 18th Vict. cap. 23, the former law of succession to personal estate in Scotland remains, as has been mentioned.

Jus Relictæ.—Where the deceased is a married man, his relict is entitled to one-third of the personal estate forming the goods in communion, provided he has left issue, and to one-half where he has left none, the remaining two-thirds or one-half, as the case may be, of the estate belonging to the husband's next of kin or others, according to the rules above set forth. The relict's legal right is not defeasible by a *mortis causa* deed of the husband. In adjusting the claims of the next of kin, father, mother, and others, the *jus relictæ* must, it is thought, be dealt with as a debt due by the deceased; thus, although the father is by the Jus Relictæ.

Jus relictæ. statute (section 3) declared to have right to one-half of his son's moveable estate, and the brothers and sisters to the other half, in case of the son dying without issue, the relict of the son would, preferably to all, be entitled to one-half *jure relictæ*, thus practically giving the father only one-fourth of his son's estate. At the same time, the relict having been ignored throughout the Act, it is not quite plain how her right should be provided for. In particular, it might plausibly be contended, that under section 3 of the Act the father is entitled to one-half of his son's estate, the relict having the other half, to the total exclusion of the brothers and sisters of the son.

Goods in Communion. *Representatives of Wife's Share of Goods in Communion.*—By our former law upon occasion of the death of a wife having children, they were entitled to one-third part of the personal property of their father, considered and termed goods in communion; and in case of a wife dying without issue, her brothers and sisters, or other next of kin, were entitled to one-half of her surviving husband's personal property. A great hardship was felt to be thus inflicted upon surviving husbands, and accordingly, the Act 18th Vict. cap. 23, § 6, enacts, that "Where a "wife shall predecease her husband, the next of kin, executors, "or other representatives of such wife, whether testate or in- "testate, shall have no right to any share of the goods in com- "munion, nor shall any legacy or bequest or testamentary "disposition thereof by such wife affect or attach to the said "goods, or any portion thereof."

Legitim. *Legitim, or Bairns' Part of Gear.*—This is another right which, like the *jus relictæ*, interferes with the distribution of the moveable succession of a man who has been married. When a father dies leaving a widow and children, his free moveable estate suffers a division into three equal parts,—one-third part

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is divided equally among all the children, whether of his last or any former marriage, as *legitim;* another third goes to his widow, as her *jus relictæ;* and the remaining third is what is called *dead's part*, which the father may dispose of as he pleases, by testament or otherwise. Where he has made no testamentary or other destination of the *dead's part*, it goes to his children as his executors. Where the father leaves children but no widow, or where the widow in her contract of marriage has renounced the *jus relictæ*, one-half of his free moveable property is *legitim*, the other is *dead's part.* As the law of representation is not applicable to moveable property in Scotland, except by force of the statute of 1855, and as that statute does not deal with legitim at all—probably from an oversight—the children of a deceased child are in no case entitled to claim any part of their grandfather's moveable estate, as the legitim to which their parent would have been entitled. It is the children alive at the time of the father's death to whom alone the right of legitim belongs. The claim of legitim may be excluded by giving the children a provision in an ante-nuptial contract of marriage in name of legitim. But where this has not been done, the right is not directly or gratuitously defeasible; and even where a conventional provision has been substituted in an ante-nuptial contract of marriage in lieu of the legitim, it would seem to be optional to the child or children either to accept the conventional provision, or to reject it, and insist on their legitim. Where, however, the conventional provision bears expressly to be given in name of legitim, the children can neither take the provision, nor any other benefit under the contract, and at the same time insist on the legitim. A provision in a contract of marriage, whether ante-nuptial or post-nuptial, whereby the legitim of the children should be entirely excluded, without

Legitim.

Legitim. making any other provision for the children, would be inoperative against them. The father, no doubt, in the exercise of his uncontrolled power of administration during his life, may, by converting moveable into heritable property, or even by a *de præsenti* and completed conveyance of his whole moveable property, diminish, or entirely defeat, the claim of legitim. But every device of this description, made with the evident intention of defeating the claim, is liable to be set aside at the instance of the children, and would not certainly be viewed favourably by the Court. It seems to be settled that the legitim cannot be diminished or affected by a deathbed deed, or by a testamentary or *mortis causa* or revocable deed of any kind, whether deathbed or not, the dead's part alone being disposable in this way. No deed or settlement of the father, regulating the succession to the legitim, is effectual, even where the child is a bankrupt, a pupil, or an idiot.

CHAPTER V.

DOMICILE.

Commissariot regulated by Domicile.

IN order to determine the commissariot in which it is necessary to apply for a decree-dative or confirmation, it is requisite to fix what was the domicile of the deceased at the time of his death; because if the deceased died domiciled in any part of Scotland, the application must be made to the commissary of the commissariot—being the sheriff of the county—within which the deceased had his domicile. If the domicile of the deceased was "furth of Scotland," the commissariot of Edinburgh is the *commune forum*, as well as in the cases of persons dying "without any fixed or known domicile." (21st and 22d Vict. cap. 56, § 3.) What, then, constitutes and determines the domicile of the deceased at the time of his death, is the question; and it is to be regretted that conflicting opinions and decisions exist on the point.

Domicile what?

1. Domicile may be defined generally as the place where a person has his home, or where his usual residence is fixed.

One Domicile.

2. For the purposes of succession, a person can have but one domicile. Neither is one domicile lost until another has been actually acquired; thus, a lady who had acquired a domicile in Scotland, was held not to have lost it, though she had left that country, and resided on the Continent for one year, then in England for two years, and, after returning to Scotland for a few months on a visit, again in England till her death, three years afterwards. She had lived in furnished lodgings, or with friends, both on the Continent and in England, and had no permanent residence after leaving Scotland. (Arnot *v.* Groom, 24th November 1846.)

Domicile.

Domicile of Origin.

3. If no new domicile be acquired, a man retains his domicile of origin. The domicile of origin is the domicile of the parents, in illegitimacy the domicile of the mother, at the time of the birth; thus, the child of English parents born in Scotland during the residence of his father there on military service, was held to be domiciled in England. (Wyllie *v.* Laye, 11th July 1834.)

Change of Domicile.

4. In acquiring a new, or reverting to a former domicile, the change must be *animo et facto*, that is, a man must not only have an intention to fix his residence in a new place, but he must also have actually left his former residence *non animo revertendi*, and arrived at his new residence, or at least be *in itinere* thereto. In Scotland a residence of forty days is held sufficient to establish a domicile for certain purposes, but it is not sufficient to warrant the confirmation of an executor by the commissary of the district, unless, of course, along with the intention to reside there permanently; and if such intention exists, the duration of the residence does not appear to be an element of much consequence.

Military Service.

5. A man does not lose his domicile by going to foreign parts in the military service of his own country; but if he enter the military service of a foreign country, then his domicile is in that country.

India.

6. Residence in India for the purpose of following a profession there in the service of the East India Company has been held to fix the domicile of the party in that country while he continued in the service. The recent transfer of the government of India from the Company to the Crown, does not appear to change the effect of entering the Indian service, as the obligation of residence is the same now as formerly.

Where two Residences.

7. When a man has two residences, one in the country and the other in the metropolis, the presumption is held to be, that

if he be a nobleman or landed proprietor, his domicile is in the country, but if he be a merchant or in the practice of any trade or profession, that his domicile is in the metropolis.

Temporary Residence.

8. A person going from Scotland to England or Ireland, or to a foreign country for a temporary purpose, or even for carrying on trade there, but with a clear intention of returning to Scotland, retains his Scotch domicile however long his absence from that country may be. Thus, upon the ground of the *animus revertendi* and an establishment retained, a party was held to be a Scotchman and his will was construed according to the law of Scotland, notwithstanding his residence in Virginia. (Alexander *v.* M'Culloch.—Robertson on Succession, p. 172, *note.*)

Mariners, &c

9. In the case of mariners or others whose profession or inclination leads them to spend a wandering and unsettled life, without acquiring a permanent residence in any particular place, the domicile of origin reverts, or rather, as it has never been lost, continues to prevail.

Ambassador.

10. An ambassador at a foreign court and the members of his family residing with him, retain their domicile in the country which he represents. But this rule is not considered to apply to a consul who may be a native or a merchant engaged in the trade of the country in which he exercises his functions.

Consul.

Ecclesiastic.

11. The domicile of the beneficed ecclesiastic has always been held to be the spot in which his benefice is situated. This rule fixes the domicile of a parish minister in Scotland in the county in which his parish is situated.

Student.

12. A student residing at a university for the purpose of his education does not necessarily acquire a domicile there.

Lunatic.

13. The domicile of a lunatic would appear to be either his domicile of origin, or that which he had last voluntarily chosen,

rather than the place where he may be kept or confined during the period of his lunacy. On this point, however, no decision has been given. In Lord Annandale's case (1796), the Lord Chancellor said, "I am not clear that the period of the lunacy "is totally to be discarded."

Domestic Servant.

14. The domicile of a domestic servant is generally that of his master, or the place where he may have usually lived though under different masters, and where he may have collected his earnings or acquired property. But if he has frequently visited his native place during intervals of service, deposited his savings there, or kept up such a correspondence or connection with it as would imply an intention to return thither, there might be a strong presumption that he still retained his domicile of origin.

Wife.

15. A wife takes the domicile of her husband, and she retains it after his death until she acquire another domicile.

Minor.

16. The domicile of a minor is the domicile of his father, or of his mother during her widowhood, or of his legally appointed guardian. By the law of Scotland a minor may choose his own domicile on attaining the age of puberty. In the case of Pottinger *v.* Wightman, it was decided that children remaining under the care of their mother after the father's decease follow the domicile which she may acquire, should she cease to retain that which their father had at his death—provided, however, that the mother does not shift the place of abode of herself and her children with a fraudulent view to their succession. But in a case before the Court of Session, on which, however, no final judgment was pronounced, the Lord Ordinary seems to have taken a different view from that on which the above decision is based. The facts were these;—Robert Alexander Paterson Wallace was born in Scotland, but his father dying while he

was an infant, he was carried to England by his mother, who removed thither shortly after her husband's death. His mother also died while he was still a child, but he remained in England under the charge of other relations during his minority, and afterwards of his own accord till he had attained the age of 22 years, when he died there. The Lord Ordinary (Cringletie) remarked in a note on the cause when he pronounced an interlocutor, that "even had there been no contract made before he "was permitted to accompany her (his mother), he could have "no doubt that had he died in pupillarity his legal domicile of "Scotland could not have been changed by his residence in "England." The same case came before the Prerogative Court of Canterbury in another form, but no opinion was given in regard to the change of domicile in infancy, the judge founding his opinion on this;—that the deceased had himself selected an English domicile after he had attained majority. (Robertson on Succession, pp. 196, 201 and *note*.) Minor.

Some of the more important cases in reference to this subject may now be briefly noticed:— Cases.

Bruce v. *Bruce*.—Major Bruce, a domiciled Scotchman, went to India in the service of the East India Company, and remained there several years. He had expressed an intention to return and spend his last days in his native land, and with that view had transferred part of his property to this country; but he died in Calcutta, before carrying his intention into effect. He was held to have acquired a domicile in India while in the Company's service, which he had never abandoned. (25th June 1788, affirmed by House of Lords, 15th April 1790.)

Macdonald v. *Laing*.—William Macdonald, a native of Scotland, went to Jamaica, acquired a plantation, and resided there for fifteen years. He was then appointed a lieutenant in a

Cases.

regiment at that time quartered in the island, and four years afterwards he visited Scotland for the recovery of his health, having obtained leave of absence for a year. He died a few months after his arrival in Scotland; and though letters were produced showing an intention to return to Jamaica on the restoration of his health, it was held that he died domiciled in Scotland, "in respect that he died in Scotland, his native "country, where he had resided several months before his "death." Some of the judges were of opinion, however, that the domicile of the deceased was in Jamaica, but the majority of the Court held an opposite view. (27th November 1794.) In comparing this decision with that in Munroe *v.* Douglas, *infra*, there would seem to be some conflict between the principles founded on.—See also Colville *v.* Lauder, *infra*.

Ommaney v. *Bingham*.—Sir Charles Douglas was born in Scotland in 1729, and at the age of twelve entered the British Navy, where he served for some years. He was then employed for a short period in the Russian, and afterwards in the Dutch service, and finally, again in that of Britain. He had no fixed residence in England till 1776, when he took a house at Gosport, where his family resided, and where he also resided during the intervals of active service. He made four temporary visits to Scotland during his life, on the last of which, two days after his arrival, he died in Edinburgh, in furnished lodgings. On appeal from the Court of Session to the House of Lords, it was decided that Sir Charles died domiciled in England. In delivering judgment, the Lord Chancellor held that by entering the military service of a foreign State he had abandoned his Scotch domicile, and also that "as a matter of fact he was domiciled in "Gosport, that is, his family and establishment were there for "seven years successively from the year 1776, even when ser-

" vice called him personally to another quarter." (House of Lords, 18th March 1796). Cases.

Colville v. *Lauder.*—David Lauder, a native of Scotland, went to St. Vincent's in the West Indies in 1793, to follow his trade as a carpenter, leaving his wife with her relations at Leith. After residing four years in St. Vincent's, he determined to go to America, and in the event of his not succeeding there, to return to Scotland. Having arrived at New York, he remained there till spring 1798, and then proceeded to Canada, where he was drowned in the September of that year. It appeared from some papers found in his possession that he meant to have returned to Scotland in a few months. He was held to be domiciled in Scotland at the time of his decease. And it was observed on the bench, " that when the deceased was in St. " Vincent's his succession must have been regulated by the law " of England, but after leaving that island, he must, in the " whole circumstances, be considered *in transitu* to Scotland." (15th January 1800.) The main ground of the decision seems to have been that Lauder died *in itinerê* towards an intended domicile, and the question would therefore be, whether the *intention* was established? In Munroe's case the evidence of such *intention* was not considered sufficient, and a different decision was accordingly given. In regard to the above case, it may be observed, that it has been considered doubtful whether Lauder had finally lost the domicile in St. Vincent's which it is admitted he had acquired.—See Macdonald *v.* Laing, *ante*, and Munroe *v.* Douglas, *infra.*

Sommerville v. *Sommerville.*—Lord Sommerville, by birth and extraction domiciled in Scotland, took a house in London, lived there half the year, and had money in the funds, still, however, continuing to maintain an establishment at his family

Cases. estate in Scotland. He died at his residence in London. It was decided that his original domicile continued. (Chancery Court, January and February 1801.)

Hog v. *Lashley*.—Roger Hog, a Scotchman, went to London in early life, and settled in business as a merchant and banker. In 1738 he married an English lady in England, and bought certain premises at Kingston in Surrey, which were conveyed to the trustees of the marriage articles for purposes specified therein. Having acquired considerable fortune in London, he purchased in 1752 the estate of Newliston in Scotland, and from that period began to reside during part of his time in Scotland, his residences in that country becoming longer by degrees. In 1754 he entered into a copartnery in London for a period of two years, which was afterwards renewed for four years more—it being stated in the articles of partnership that he intended "chiefly "to reside in Scotland during the continuance of this copart- "nership," though provision was also made for what was to be done if he came to London in the winters. In July 1759 Mr. and Mrs. Hog left London for Newliston, and Mrs. Hog died at that place in February 1760. At this period, besides his business, the bulk of Mr. Hog's personal estate was in England. In 1765 Mr. Hog again renewed his former partnership, still styling himself in the articles "of London, merchant," but giving up to one of his sons one-half, and in 1772 the whole of his share in the stock and business of the company. He died at Newliston in 1789. It does not appear to have been doubted that his domicile was in Scotland at the time of his death; but the question which arose was this—What was his domicile at the time of the dissolution of his marriage by the death of his wife? After much litigation, the decision of the Court of Session, that he was domiciled in Scotland at the death

of his wife, was affirmed by the House of Lords. (16th July 1804.) Cases.

Chiene v. *Sykes and others.*—Robert Chiene, a native of Crail, in Scotland, entered the seafaring line, and went abroad. He returned to Crail in 1784 or 1787, where he remained less than twelve months, and again went abroad as a sailor. In 1802 he again returned to Crail, and died there in same year. During the period of his absence preceding his final return to Crail, he had married a lady who resided in Philadelphia, and who continued to reside there at the time of his death. During the same period a house had been purchased for him at Crail, in which he had gone to reside a short time previous to his decease, and he had intended to purchase land in the neighbourhood. The decree of the Master of the Rolls was accordingly that he was domiciled in Scotland at the time of his decease. (Rolls Court, 1811.)

Munroe v. *Douglas.*—Dr. Munroe, born and educated in Scotland, had acquired a domicile in India while acting as assistant-surgeon in the East India Company's service. He had expressed some vague intention of returning home, and in 1815 he arrived in England, but became undetermined whether he should continue to reside there, or spend his days in Scotland. He visited Scotland in July 1816, and died there on the 8th August following. It was decided that Dr. Munroe acquired no new domicile after he quitted India, and that, consequently, his Indian domicile subsisted at his death. In giving judgement, the vice-chancellor (Sir John Leach) said, "A domicile cannot "be lost by mere abandonment. It is not to be defeated *animo* "merely, but *animo et facto*, and necessarily remains until a "subsequent domicile be acquired, unless the party die *in itinere* "towards an intended domicile." (June and July 1820.)

Cases.

Clark v. *Newmarch.*—An English military officer was, in 1746, appointed governor of Fort Augustus in Scotland, where he continued to live constantly till his death in 1797. In Scotland he had married a domiciled Scotch woman, cultivated a farm, and acted as a justice of the peace. It was held that he had lost his English domicile, and was domiciled in Scotland at the time of his death. (16th February 1836.)

Commissioners of Inland Revenue v. *Gordon's Executors.*—In this case it was held that a naval officer on half-pay had acquired a domicile at St. Kitts, where he had resided for some years, and held a public office. (Exchequer, 2d February 1850.)

Brown v. *Smith.*—W. C. Watt was born in Scotland in 1795. At the age of sixteen he entered the royal navy as a surgeon, and served in several ships in succession. On being put on half-pay in 1818 he lived in Scotland for about a year, when he got a fresh appointment. He was again on half-pay in 1826, when he returned to Scotland and remained for two years. After this period he was employed under the Admiralty in various convict-ships. In 1829 he removed his sister, the only surviving member of his family, to London, and lived with her there at intervals when put on half-pay, and never revisited Scotland. At last, getting an appointment at Malta, he and his sister went and resided there for several years. She died in 1846, and he died in 1848, both at Malta. The Master of the Rolls held that he had not lost his domicile of origin. (12th February 1852.)

Shedden, &c. v. *Patrick, &c.*—A person born in Scotland, and a proprietor of land there, went to America, where he remained for many years and died, having married on his death-bed a woman who had previously borne him a child in America. One of the questions raised in the case was, whether the allegations

were relevant to infer that the party was at the date of the marriage a domiciled Scotchman, and if so, whether the marriage legitimated her child in Scotland. The main object, however, in the case being the reduction of a decree on the ground of fraud, the discussion of the question of domicile was incidental, and no decision was pronounced thereon. The action was dismissed (10th March 1852), and on appeal to the House of Lords this conclusion was affirmed. (15th May 1854.) Cases.

Bank of Scotland v. *Hall, &c.*—Husband and wife, married in Scotland, resided there for two years, removed to England, where also they resided two years; the wife then returned to Scotland alone, and died two years thereafter. Found that the domicile of the married parties was in England at the time of the dissolution of the marriage by her death. (12th July 1854.)

Exchequer v. *Lamont.*—John Lamont, born in Scotland in 1782, went to Trinidad in 1801 or 1802, and died there in 1850. In 1828 he paid a first visit to his native country, and between that time and his death made repeated visits, acquired business premises in Glasgow, and had an agent there, and purchased an estate in Argyleshire, on which he built a mansion-house. But he never expressed any intention of returning to Scotland to reside permanently. He retained at his death the estates, houses, establishments, and an official position which he had acquired in Trinidad, and had never expressed an intention to abandon them otherwise than for a season, or with a view of returning to Trinidad. Found that he was at the time of his death domiciled at Trinidad. (29th May 1857.)

Donaldson v. *M'Clure.*—A Scotchman by birth went to and resided in England, where he carried on business and married. After the elapse of nearly thirty years he returned to Scotland, where he purchased a residence, at which his wife died without

Cases.

leaving issue. On the ground that the domicile of the married pair was in Scotland at the dissolution of the marriage, a claim was made by a party as next of kin to the wife, and as such entitled to a half of the goods in communion. Circumstances in which the court repelled the claim, on the ground that the domicile of the parties was in England at the dissolution of the marriage. (18th December 1857.)

Provision that would have met doubt.

In the bill drafted by the author, it was made competent to apply for a decree-dative or confirmation either to the Commissary of the county in Scotland in which the defunct was supposed to have died domiciled, or to the judge of the Commissariot of Edinburgh, as a *commune forum* for all Scotland, as well as for persons dying furth of Scotland. Had that proposal been adopted, it would have saved the discussion of all questions in the case of intestate succession, and of many in the case of testate succession, whether the domicile of the deceased was Scotch or foreign; because *esto* the domicile was either Scotch or foreign, Edinburgh was the proper judicatory. In illustration it may be mentioned, that a question arose whether the late Sir Charles Adam, by being Governor of Greenwich Hospital, under an obligation to reside there, had his domicile in England, or whether, having a family mansion and an establishment in Kinross-shire, his domicile was in that county in Scotland. If Edinburgh had been a *commune forum*, it might have been resorted to with perfect security, whether the governorship of Greenwich Hospital, or the mansion in Kinross-shire had been held to fix Sir Charles' domicile. Not only, however, does the alteration made on the bill bring into discussion perplexing questions as to whether the domicile was Scotch or foreign, but it also leaves a fertile field for litigation upon the interior question—In what particular county in Scot-

Domicile.

land the deceased had his domicile at the time of his death, and in what particular Commissariot confirmation must be expede to his estate. The author's suggestion for a *commune forum* in Scotland, with respect to personal estate, as it existed in the case of services of heirs to heritable property before the sheriff of Chancery at Edinburgh, was adopted by the Lord Advocate, Mr. Inglis, in the bill brought by his Lordship into Parliament, and insisted on by him when the bill went first through committee in the House of Commons, but was abandoned on the recommitment of the bill at the instance of Mr. Dunlop and other honourable members, not negligent of the interest of inferior commissary clerks and practitioners, whose emoluments might have been interfered with by conferring the option on the public of expeding confirmation either in the county where the deceased died domiciled, or in Edinburgh as a *commune forum* for all Scotland. It was only proposed to be made optional to resort to Edinburgh, not compulsory in any case. The Reasons for the society of Writers to the Signet, in support of their petition to the House of Lords (which was unsuccessful, although advocated by Ex-Chancellors Brougham and Cranworth), in favour of the bill as brought into Parliament by the Lord Advocate and amended in committee, and *against* the alterations made on the bill on recommitment, will be found in the Appendix.

Provision that would have met doubt.

Upon the subject of domicile, reference is made to Bell's Dictionary and Digest of the Law of Scotland, and authorities there referred to; Williams' Treatise on the Law of Executors; Robertson's Treatise on Personal Succession; Story's Conflict of Laws; and Phillimore on Domicile.

CHAPTER VI.

APPOINTMENT OF EXECUTOR IN CASE OF INTESTACY, OR WHERE THERE HAS BEEN NO NOMINATION OF EXECUTORS.

Jurisdiction.

WHERE a party possessed of moveable or personal estate in Scotland, has died intestate, or without nominating executors, his next of kin, or others entitled by law to share the succession, or to acquire part of the estate, may apply to the commissary of the county in which the defunct had his domicile at the time of his death, to be decerned his executors. In case of the defunct having died domiciled furth of Scotland, or without any fixed domicile, the application falls to be made to the Commissary Court of Edinburgh.

Form of Petition.

The petition must be in the form prescribed by Schedule A annexed to the Act of 1858, being in the most brief and simple terms, and capable of easy adaptation to ordinary cases. The schedule is in these terms :—

> Unto the Honourable the Commissary of (*specify the county*), the Petition of *A. B.* (*here name and design the petitioner*) ;
>
> *Humbly Sheweth*,—That the late *C. D.* (*here name and design the deceased person to whom an executor is sought to be appointed*), died at (*specify place*), on or about the (*specify date*), and had, at the time of his death, his ordinary or principal domicile in the county of (*specify county, or* " furth of Scotland," *or*, " without any fixed domicile," *or*, " without any known domi- " cile," *as the case may be*).

in case of Intestacy, &c.

Form of Petition.

That the petitioner is the only son and next of kin (*or state what other relationship, character, or title, the petitioner has, giving him right to apply for the appointment of executor*).

May it therefore please your Lordship to decern the petitioner executor-dative, *quâ* next of kin to the said *C. D.* (*or state the other character in which the petitioner claims to be appointed executor*).

According to Justice, &c.

(*Signed by the petitioner or his agent.*)

WHO MAY PETITION, AND BE DECERNED EXECUTORS-DATIVE.

Who may Petition.

Previous to the Act of 1858, if there was no executor nominated by the defunct, or if he had not expede confirmation, it was competent for certain parties to apply to be decerned executors-dative of the defunct, and these had a certain order of preference, viz.—

Order previous to 1858.

1. The general disponee, universal legatory, or residuary legatee of the defunct.

For what is to be considered a general disponee, see M'Gowan *v.* M'Kinlay, 4th December 1835.

2. The next of kin of the defunct at the time of his death, all in the same degree being entitled to be conjoined in the office; and by the Act of 19th July 1823, where any of the next of kin had survived the intestate, but died before expeding confirmation, the right of such next of kin transmitted to his or her representatives, and such representatives were likewise entitled to the office of executor.

In certain circumstances, a party holding the beneficial

Order previous to 1858.

interest of the next of kin was preferred to the next of kin. (Macpherson *v.* Macpherson, Feb. 7, 1855).

3. The relict of the defunct.

4. Creditors of the defunct by liquid grounds of debt. The funerator.

5. Special legatees; and,

6. Factors appointed and authorised by the Lords of Council and Session, (A. S. 13th February 1730), or appointed by the commissary for the purpose of expeding confirmation.

Order now.

The Act of 1855 materially altered, as already explained (Chap. IV.), the right of succession to moveables, and consequently the persons entitled to the office of executor, as well as the order of preference. The following appears now to be the order; but the question is very unsettled, in consequence of the Act omitting to make provision on the point, except in one instance, and taking no notice whatever of the relict.

Disponee.

1. The general disponee, universal legatory, or residuary legatee of the defunct.

Next of kin surviving defunct, and their representatives.

2. The next of kin of the defunct alive at the time of his death, along with the representatives of any next of kin who may have survived the intestate. Act 4th Geo. IV. cap. 98, § 1.*

* Are the children of predeceasing next of kin excluded by the *representatives* of surviving next of kin of the intestate? The act of 1855 does not provide for the case of the claimants for the office being all in the same degree of propinquity to the intestate. In illustration: suppose a father predeceased by a son B, who leaves issue X and Y, and survived by a son, C, who dies without expeding confirmation, leaving an only child, D. At the time of applying for confirmation, X, Y, and D are the existing next of kin of their grandfather, A. Is D entitled to the office of executor as the "representative" of C, to the exclusion of his cousins-german, X and Y, all being alike grandchildren of A, the intestate?

in case of Intestacy, &c.

3. The children or other descendants of any next of kin who predeceased the intestate are entitled to the office, when no next of kin compete for the same. Act of 1855, § 1. Children, &c., of predeceasing next of kin.

4. The relict appears next in order entitled to the office, although she seems to have been overlooked in the Act of 1855. Relict.

5. Where the defunct has died intestate before his father, without leaving issue, the father is entitled to the office of executor jointly with any brothers or sisters of the defunct, or their descendants, who may have survived such intestate. § 3. In the event of the brothers or sisters, or their descendants, not claiming the office of executor, the father would appear to be entitled to it alone; and in the same way the brothers and sisters would be entitled to be decerned and confirmed executors, if the father did not compete. Father.

6. Where an intestate dies after his father, without leaving issue, the surviving mother is entitled to the office of executor jointly with the brothers and sisters of the defunct, or their descendants, or other next of kin of such intestate. § 4. In the event of the brothers or sisters, or their descendants, or other next of kin, not claiming the office of executor, the mother would appear to be entitled to it alone; and in the same way the brothers and sisters, or their descendants, or other next of kin, would be entitled to be decerned and confirmed executors, in the event of the mother not claiming the office. Mother.

7. Brothers and sisters uterine and their descendants are likewise now entitled to be conjoined in the office of executor with the next of kin of the intestate, dying without issue, if both his father and mother have predeceased him, and if he shall not have left any brother or sister german or consanguinean, nor any descendant of a brother or sister german or consanguinean. § 5. In the event of the next of kin not claiming Uterine.

the office of executor, the brother or sister uterine or their descendants would be entitled to it alone, and *vice versa*.

Creditors. 8. Creditors of the defunct by liquid grounds of debt. The funerator.

Legatees. 9. Special legatees; and

Factors. 10. Factors appointed and authorised factors by the Lords of Council and Session, (A. S. 13th February 1730), or appointed by the commissary for the purpose of expeding confirmation.

Law of domicile prevails. If the defunct did not die domiciled in Scotland, it is not the parties who by the law of Scotland would be entitled to the succession to his moveable estate that have right to the office of executor, but those by the law of the country in which the defunct had his domicile at the time of his death have such right. Thus, even before the passing of the Statute of 1855, the mother of a party dying domiciled in England, was found entitled to be decerned, by the Commissary Court of Edinburgh, executor-dative of her son. (Marchioness of Hastings *v.* Executors of Marquis of Hastings, Feb. 10, 1852.)

Forms. Forms of petitions are given in the Appendix to suit all these different classes of cases.

Who are representatives. The term "representatives" of the next of kin, used in the Act 4th Geo. IV. cap. 98, has been construed to mean, not only the persons who in case of intestacy would succeed to such next of kin, but a husband *jure mariti*, creditors, executors-nominate, and others having a legal title to the succession, as appears from the following decisions under the Act:—

Cases. *Mann* v. *Thomas*.—In this case it was held that if one of the next of kin of an intestate defunct dies unconfirmed, but has executed an assignation of his share in the moveable succession, the assignee is entitled to claim that share under the Sta-

tute 4th Geo. IV. cap. 98, in preference to a party who has been confirmed executor *qua* next of kin, both to the deceased cedent of the assignee, and to the intestate. (9th February 1830.) The grounds of this decision were these—that the Statute 4th Geo. IV. cap. 98, was enacted for the purpose of removing the hardship arising from the death of the executor before confirmation, which, in the previous state of the law, rendered his right to the executry intransmissible—that the hardship was the same on assignees and on next of kin—that the term representatives in the statute, though ill chosen, must be liberally construed, and, in a legal sense, may include those who take by deed as well as by intestate succession—that if no right vested there could be no transmission, and therefore that the statute was intended to vest a right to moveables in the executor unconfirmed. Cases.

Greig v. *Malcolm.*—It was held by the Lord Ordinary and acquiesced in, that the Statute 4th Geo. IV. cap. 98, in regard to a succession which had opened prior to that statute, has no retrospective effect, though the competition for the office of executor arose subsequently to the statute. (5th March 1835.)

Frith v. *Buchanan.*—Held, (confirming Mann *v.* Thomas,) that by the Statute 4th Geo. IV. cap. 98, the moveable estate of a deceased party vests, *ipse jure*, in the surviving next of kin, to the effect of being either assignable or arrestable, and therefore, that a creditor of one of the next of kin, arresting in the hands of a debtor of the deceased, was entitled to payment, although the debtor had afterwards paid the amount to another of the next of kin who had confirmed the debt. (3d March 1837.)

Mein v. *M'Call.*—During the dependence of an action of damages the pursuer died, and thereafter his widow, having

Cases. expede confirmation as executrix, and given up the claim of damages as part of the executry, also died, before the testament was executed, or the action of damages disposed of. It was held that the confirmation vested the right to the action in the widow, and consequently that a creditor who was decerned executor *qua* creditor to her, was entitled to take up the claim and obtain himself sisted as pursuer in the action. (7th June 1844.)

Minor and Pupil. A minor may be decerned and confirmed executor, (Johnstone *v.* Lowden, 15th February 1838); also, it would appear, a pupil, although he must pursue through his administrator-in-law. (Reid *v.* Turner, 23d June 1830.)

LODGING AND INTIMATION OF PETITION, AND CERTIFICATE OF INTIMATION.

Lodging and intimation of Petition. The statute of 23d July 1858, section 4, enacts—That every petition for the appointment of an executor, in place of being published at the kirk-door, and market cross, as edicts of executry have been in use to be published, shall be intimated by the commissary clerk affixing on the door of the Commissary Court House, or in some conspicuous place of the Court, and of the office of the commissary clerk, in such manner as the Commissary may direct, a full copy of the petition; and by the keeper of the record of edictal citations at *Edinburgh* inserting in a book, to be kept by him for that purpose, the names and designations of the petitioner and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be decerned executor, which particulars the keeper of the record of edictal citations shall cause to be printed and published weekly, along with the abstracts of the petitions for general

and special services, in the form of Schedule B annexed to the act. To enable the keeper of the record of edictal citations to make such publication, the commissary clerk shall transmit to him the said particulars; and to enable the commissary clerk to grant the certificate after mentioned, the keeper of the record of edictal citations shall transmit to the commissary clerk a copy, certified by the said keeper, of the printed and published particulars, all in such form and manner, and on payment of such fees as the Court of Session by Act of Sederunt may direct.

Lodging and intimation of Petition.

In the Commissary Court of Edinburgh, the petition, with two copies thereof, must be lodged with the clerk of court before one o'clock of Friday, if it is wished that the petition shall appear in the roll of petitions for the appointment of executors published on the following Monday by the keeper of the record of edictal citations.—*Vide* Commissary Order in Appendix. Any documents founded on such as a testamentary writing by a residuary legatee, a ground of debt by a creditor, or an act and warrant of appointment by a judicial factor, fall to be lodged at the same time. In inferior Commissary Courts the lodging of the petition will be made to depend on their means of communication with Edinburgh, and the time within which the clerks may be able to furnish the keeper of the record of edictal citations with their respective rolls of petitions.

Every Friday afternoon a roll of the petitions presented during the preceding eight days is framed by the commissary clerk of Edinburgh, in the form of Schedule B, annexed to the act, and transmitted to the keeper of the record of edictal citations, to be printed and published by the Monday following.

A certified print of the abstract of the roll of petitions for the appointment of executors, published by the keeper of the record

Intimation of Petition.

of edictal citations, is transmitted by the keeper to every commissary clerk in Scotland, as his warrant for certifying, in terms of Schedule C annexed to the act, that the petition was intimated by being published by the keeper of the record of edictal citations at Edinburgh, in the printed roll of petitions for the appointment of executors in the Commissary Courts of Scotland.

The Commissary of Edinburgh has appointed a full copy of the petition to be affixed by the commissary clerk to the south wall of the court-room, and another copy of the petition to be affixed by him to the wall of the office of the commissary clerk, for publication thereof, in conjunction with the publication in the record of edictal citations.—*Vide* Appendix.

Where a second petition for the appointment of an executor, erroneously termed in the statute a second petition "for confir-" mation," is presented in reference to the same personal estate, the Commissary must direct intimation of such petition to be made to the party who presented the first petition. § 5. It appears also necessary to intimate on some place of the court-house, and of the office of the commissary clerk, and also in the record of edictal citations, any second petition as much as a first petition.

Certificate of intimation.

Upon receiving the certified copy of the printed and published particulars required by the statute from the keeper of the record of edictal citations, the commissary clerk must forthwith certify on the petition that the same has been intimated and published, in terms of the provisions of the act, in the form of Schedule C thereunto annexed, and such certificate shall be sufficient evidence of the facts therein set forth. § 5. The Commissary of Edinburgh has directed that the certificate by the commissary clerk shall also bear that the petition has been

intimated by affixing a copy thereof to the south wall of the court-room, and on the wall of the office of the commissary clerk; and that the certificate shall be dated, although this is not prescribed by the schedule.—*Vide* Appendix.

Calling and decree-dative.

On the expiration of nine days after the commissary clerk has certified the intimation and publication of a petition for the appointment of an executor, the same may be called in Court, and an executor decerned, or other procedure may take place, according to the forms formerly in use in case of edicts of executry, and with the like force and effect. § 6.

Extract.

Decrees-dative were formerly extractable immediately after they were pronounced, but decrees-dative cannot now be extracted till the expiration of three lawful days after they have been pronounced. § 6. The issuing of a testament-dative proceeding on the decree must of course wait its becoming final.

Title conferred.

A decree-dative confers a title on the executor to sue and be sued, but not to uplift or receive, which is only conferred by the testament-dative.

Reponing.

A party may be reponed against a decree-dative even after extract, reserving the effect of what may have followed thereon in the meantime. M'Pherson *v.* M'Pherson, 2d February 1855.

Compearer.

In White's Executry, 27th January 1859, the commissary-depute of Edinburgh held that another next of kin compearing might be conjoined with the petitioner, but in Chalmers' Executry, 8th February 1859, the Commissary refused to decern a mere compearer executor-dative, to the exclusion of the petitioner for the office.

Act 4th Geo. IV. cap. 98.

The provision of the Act 4th Geo. IV. cap. 98, § 1, applies to the cases of all next of kin dying without confirmation after the passing of the Act, although the intestate ancestor died before it passed, (Trustees of the Muirkirk and Cambuslang Road Trust *v.* Cunningham, &c., 15th January 1856), and decree-dative may be pronounced accordingly.

CHAPTER VII.

INVENTORIES OF PERSONAL ESTATE.

Contents of Inventory.

After obtaining himself decerned executor-dative, the next step to be taken by the party is to lodge with the commissary clerk of the same county in which he has been so decerned executor-dative, "a full and true inventory, duly stamped as "required by" the Act 48th Geo. III. cap. 149, "of all the per- "sonal or moveable estate and effects of the deceased, already "recovered or known to be existing, distinguishing what shall "be situated in Scotland, and what elsewhere, together with any "testament or other writing relating to the disposal of such "estate and effects, or any part thereof, which the person or "persons, exhibiting such inventory, shall have in his, her, or "their custody or power; which said inventory, together with "such testament or other writing (if any such there be), shall "be recorded in the books of the said court, without any other "expense to the party than the ordinary fees of registration." § 38. This act designates the parties bound or entitled to give up the inventory as "all and every person or persons, who "as executor or executors, nearest in kin, creditor or creditors, "or otherwise, shall intromit with or enter upon the posses- "sion or management of any personal or moveable estate "or effects in Scotland, of any person dying after the 10th "day of October 1808." § 38. These parties are enjoined to give up the inventory "on or before disposing of, or "distributing any part of such estate or effects, or uplifting "any debt due to the deceased, and, at all events, within "six calendar months next after having assumed such posses- "sion or management, in whole or in part, and before any such

By whom to be given up.

Within what time.

Inventories of Personal Estate.

" person shall be confirmed executor or executors testamentary " or dative." § 38. In case any person required to exhibit an inventory shall " refuse or neglect so to do, within the time Penalty. " prescribed for that purpose, or shall knowingly omit any part " of the estate or effects of the deceased therein, he, she, or " they shall, for every such offence, forfeit the sum of twenty " pounds, to be recovered by ordinary action or summary com- " plaint, in the sheriff, stewart, or borough court, or before " any justice of the peace, of the shire, stewartry, or borough, " where the person or persons sued or complained of shall " reside; which court or justice shall have power, if there shall " appear cause, to mitigate such penalty, so that the same be " not reduced below one moiety thereof, besides costs of suit; " and the person or persons so offending shall also be charged " and chargeable with, and be holden liable to the payment of " double the amount of the stamp-duty, which would have been " payable upon such inventory or inventories so neglected to " be exhibited, according to the amount or value of the estate " and effects, which ought to have been specified therein, or " double the amount of the further or increased stamp-duty, " which would have been payable upon any such inventory or " inventories exhibited in respect of the estate or effects so " omitted therein, as aforesaid, as the case may require; which " double duty shall be deemed and taken to be a debt to his " Majesty, his heirs and successors, of the person or persons " liable to pay the same, and shall and may be sued for, and " recovered accordingly." § 38.

The party giving up the inventory must annex thereto an Oath. oath or solemn affirmation to the accuracy thereof, " taken either " before the commissary or his depute, or the commissary clerk " or his depute, or before any commissioner appointed by the

" commissary, or before any magistrate or justice of the peace " within the United Kingdom, or the colonies, or any British " consul."—Act 21st and 22d Vict. cap. 56, § 11.

Forms. The form of the oath to inventories was prescribed by the Commissary's instructions to the clerks, dated 31st December 1823, which will be found in the Appendix. The form recommended by the Inland Revenue, and which will also be found in the Appendix, is in conformity therewith, and the recent statute, and may be taken as a guide, with the addition, however, of a specification whether confirmation is or is not wanted. Where confirmation is not craved at the time of giving up the inventory, but is wanted afterwards, however short the interval, the party must make a new oath in the form which will be found in the Appendix, agreeably to the above mentioned Commissary's instructions to the clerks. The form of an inventory, specifying most varieties of personal property that occur in practice, will also be found in the Appendix.

Estate in England or Ireland. The prohibition that existed against including in the inventory to be confirmed personal estate in England or Ireland, has been removed by the new statute, § 9; but such estate must still be entered separately from the Scotch estate in the inventory. The inventory must be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.

Foreign Funds. Personal estate in the British Colonies, or in Foreign Countries, must be mentioned in the inventory, although such estate cannot be included in the confirmation.

Deductions. It is not competent to deduct income or property-tax from any item in the inventory.

It is also incompetent to deduct from any item in the inventory any estimated expense of collecting or realising it.

Inventories of Personal Estate.

Deductions.

Although in certain views objectionable, where a specific fund such as bank-stock or a policy of insurance has been pledged or assigned in security of a debt by the defunct to the bank or insurance office, such debt is, by the practice of the Inland Revenue Office, allowed to be made a deduction from the particular relative item in the inventory.

Debts may be valued.

Any debt due to the defunct may be valued at less than its amount by the party giving up the inventory, and the estimated value only stated as part of the estate, and the inventory duty paid accordingly. A supervening confirmation gives the executor a title to uplift the whole debt, without first giving up an additional inventory, and obtaining an eik to the confirmation. Brown *v.* Moffat or Millar, 15th December 1853. The soundness of this decision may be doubted. It enables an executor-dative to uplift the whole of a debt undervalued, without finding caution for the surplus.

Apportionment Act.

In the printed form issued by the Inland Revenue Office in aid of the preparation of inventories, it is stated, that "If the "deceased was a *liferenter or heir of entail*, and survive Whitsun-"day, one moiety of the rents of the crop of that year is per-"sonal estate;" and, "The Apportionment Act would appear "not to apply to the rents of property held by the deceased in "*fee-simple*. See Baillie *v.* Lockhart, House of Lords, 23d "April 1855." This does not quite appear from the Reports of the decisions either of the Court of Session or the House of Lords.

Trust Funds.

A common difficulty in adjusting the proper contents of an inventory arises from the desire of the executor to include in the inventory, and thus in the supervening confirmation, not only the funds that belonged to the deceased beneficially, but also funds that belonged to him in trust for others, and without paying inventory duty upon such trust funds. The laws of

Trust Funds.

England and of Scotland differ upon this point. By the law of England, trusts transmit to the representatives of the trustees on their failure by death; but by the law of Scotland, the office of a trustee and executor is personal, and consequently not descendable to heirs. Hence, when there are two or more executors-nominate, the office, upon the death of any one of them, accrues to the survivors or survivor, and it falls entirely on the death of the last. Erskine, book iii. tit. 9, § 38. It is thus incompetent to include funds held by the defunct purely in trust, in the inventory of his personal estate; and notwithstanding many representations that such would facilitate, as it no doubt might, the making up of a title to the trust-fund, the proposal has been uniformly rejected in the Commissary Court of Edinburgh, where it was noticed. Then, "how am I to make up a title?" is a question very often asked. The best mode must vary with the circumstances, and the duty of advising does not rest with the commissary clerk. A declarator of trust may be resorted to by the parties beneficially interested in the fund, or application may be made to the Court of Session for the appointment of a judicial factor to carry out the purposes of the trust—and possibly, although the author has not seen it in practice, the parties who, but for the nomination of executors which has fallen by their death, would have been entitled to the office, may, in certain cases (for example, where the funds have not been realised by, or transferred to, the executor-nominate), present a petition to the Commissary, and have themselves decerned and confirmed executors of the original defunct, *quoad non executa*. But see Reid *v.* Telfer, 16th November 1666; Downy *v.* Young, 17th November 1666; Colinson *v.* Laird of Drum, 21st November 1671.

Where, however, confirmation is obtained by an executor, chiefly, though not solely, for the executor's own behoof, *e.g.*,

Inventories of Personal Estate.

by the next of kin, the full right to such confirmation is transmitted to the representatives of the person so confirming, and thus may be included in the inventory of his personal estate, inventory-duty paid thereon, and otherwise dealt with like his own individual property.—Erskine, *ut supra*. See also Graham, 6th November 1686; and Mitchell *v.* Mitchell, 24th June 1737. Trust Funds.

It is to be borne in mind that, where the deceased executor died domiciled in England or Ireland, personal property in Scotland, though held by him entirely in trust, may be included without paying duty in any inventory that may be given up in a Commissary Court in Scotland. The permission to include, in an English or Irish probate or letters of administration, the whole personal estate belonging to the defunct, in Scotland as well as in England, will in English and Irish cases usually supersede the question of trust.

The stamp-duties payable on inventories will be found in the Appendix. Stamp duties.

When personal estate situated in England or in Ireland is included in the inventory, "the person applying for confirmation" must satisfy the Commissary that the deceased died domiciled in Scotland, and the Commissary must, by his interlocutor, find that the deceased died so domiciled. The interlocutor is declared conclusive evidence of the fact of domicile, *quoad hoc*. Act 21st and 22d Vict. cap. 56, § 9. English or Irish estate.

A twist is given to this clause from its being assumed that no one has an interest in having English or Irish estate included in the inventory, unless he is a "person applying for confirma-"tion." A person may have such interest in order to discharge government duties, and for other objects, although he may have no interest in applying for confirmation. Then again, it is unfortunately left quite indefinite how the Commissary is to

English or Irish estate.

"satisfy" himself that the deceased died domiciled in Scotland. The word "satisfy" is a novelty in Acts of Parliament relating to Scotland. In the cases that have occurred in the Commissary Court of Edinburgh, the party has presented a separate petition to the Commissary, setting forth,—first, his title; second, the date and place of the death of the deceased and his domicile at the time of his death; third, the clause of the act; fourth, that the deceased had personal estate in England or Ireland,—and praying that, upon taking the premises into consideration, the Commissary shall find that the deceased died domiciled in Scotland, and authorise his personal estate in England and in Ireland to be included in the inventory. The Commissary has, on such petition, allowed the petitioners a proof, and, upon examining witnesses, issued an interlocutor in the following terms:—"Edinburgh—(*date*)—The Commissary, having consi-"dered this petition and productions, with the proof adduced, "FINDS that the deceased (*name and designation of defunct*) died "domiciled in Scotland, and that it is competent to include in "the inventory of his personal estate and effects, to be given up "and recorded in this court, any personal estate or effects of the "deceased situated in England or Ireland, or both; and decerns."

A simple finding that the deceased died domiciled in Scotland is, however, all that is indispensible; and how the Commissary is to be satisfied is left by the Act to himself.

It is understood that the practice has varied in inferior Commissary Courts with respect to the mode in which the Commissary satisfies himself. Where it is intended that an English or Irish probate or letters of administration are to take effect in Scotland, all that is required is for the executor, in his oath to the amount of the estate, further to specify therein, that according to the deponent's belief the deceased was domiciled in

Inventories of Personal Estate.

England or Ireland, § 17; and there appears no good reason why the same facility ought not to have been specially given to Scotch executors, and considerable trouble and expense saved.

Additional Inventories.

By the Act 48th Geo. III. cap. 149, § 38, "If at any subsequent period"—to the giving up of the original inventory—"a discovery shall be made of any other effects belonging to the "deceased, an additional inventory or additional inventories of "the same shall, within two calendar months after the discovery "thereof, be in like manner exhibited upon oath or solemn "affirmation, by any person or persons intromitting with or "assuming the management of such effects, which additional "inventory or inventories shall also be recorded in the manner "aforesaid." Section 40 provides that the additional inventory shall specify the amount or value of the estate and effects of the same person comprised in the former inventory. By 16th and 17th Vict. cap. 59, § 8, such additional inventory shall be chargeable only with such amount of stamp duty as, together with the stamp duty on the former duly stamped inventory of the estate and effects of the same deceased person, shall make up the full amount of stamp duty chargeable in respect of the total estate and effects of the deceased, specified in the said additional inventory and the former inventory. If the under-estimation or the value of the property omitted shall not infer the payment of any further duty than that already paid in the former inventory, the additional inventory is exempted from duty, and may of course be written on plain paper. (See 55th Geo. III. cap. 184, Schedule, part iii.)

Form.

A form of an additional inventory and oath, recommended by the Inland Revenue Office, will be found in the Appendix.

The principal inventories, with relative oaths, are transmitted to the Inland Revenue Office by every commissary clerk in Scotland, monthly.

CHAPTER VIII.

CAUTION FOR EXECUTORS-DATIVE.

Caution. All executors-dative must find caution for their intromissions previously to confirmation being granted. By the Act 4th Geo. IV. cap. 98, § 2, it is enacted that caution shall not be required to be found by executors-nominate, and in all other cases, the court granting confirmation shall fix the amount of the sum for which caution shall be found by the person or persons to whom confirmation shall be granted, not exceeding the amount confirmed.

In the practice of the Commissary Court of Edinburgh, caution is required by the clerk of court for the full amount of the inventory lodged by an executor-dative, unless he applies by petition to the Commissary for, and obtains a restriction of caution. The form of finding caution is either by the cautioner subscribing what is termed an Act of Caution, in a book kept in the commissary clerk's office for that purpose; or where it is inconvenient to attend at the office, by his executing a separate bond of caution, which may be partly printed and partly written. Act 21st and 22d Vict. cap. 56, § 6.

Form. Forms of the act of caution and of the bond of caution, and also of the attestation by a justice of the peace of the sufficiency of the cautioner, will be found in the Appendix.

Restriction. Where the parties are desirous to have the amount for which they are to find caution restricted to less than the amount of the inventory, it is competent for them to apply by petition to the Commissary to that effect. By the instructions of the Commissaries, dated 31st December 1823, it is directed that, where

Caution for Executors-dative.

an executor-dative intends to avail himself of the second clause of the act (4th Geo. IV., cap. 98), which empowers the Court to fix the amount of caution, such executor must present a written application, stating shortly the extent of the inventory to be confirmed, the amount to which he is desirous the caution should be limited, and the grounds on which his demand is founded; which application the Court will dispose of in a summary manner, with a due regard to the circumstances of the case. An example of such petition is also to be found in the Appendix.

In the Commissary Court of Edinburgh the petition for restriction is ordered to be intimated in two Edinburgh newspapers for ten days, and on the expiration of that time the petition is advised by the Commissary, with or without any objections that may have been lodged.

CHAPTER IX.

TESTAMENT-DATIVE.

Meaning of Term.

The term confirmation is applied generally, both to testate and intestate succession. The term testament-dative is applied exclusively to the case of the deceased having died intestate, or without a nomination of executors, or without the executors-nominate being the persons requiring confirmation, such as general disponees, creditors, or legatees.

Inventory and Oath.

Before a testament-dative can be issued, the party must not only have been decerned executor-dative in some legitimate character by the Commissary, but must have lodged an inventory of the personal estate of the deceased, with an affidavit in the prescribed forms, and also have found caution in manner already explained (Chap. VIII.), and three lawful days must have expired from the date of the decree-dative. Act of 1858, § 6.

Effect of decree-dative.

A decree-dative comes in place of, and has the same effect, as a last will and testament, with a nomination of executors by the deceased, in favour of the party decerned executor-dative by the Commissary. Like a nomination of executors, the decree-dative confers a right to sue and defend with respect to executry funds, but it does not confer any right on the executor-dative to uplift, receive, administer, and dispose of the personal estate of the defunct,—such power being conferred by the supervening testament-dative or confirmation.

Form.

A form of a testament-dative for the Commissary Court of Edinburgh was prescribed by the Act of Sederunt of 28th December 1823, and another form for inferior Commissary Courts was prescribed by the Act of Sederunt of 25th February

Testament-dative.

1824; but these are superseded by a form applicable to all Commissariots, forming Schedule D annexed to the Act 21st and 22d Vict. cap. 56, which will be found in the Appendix. Form.

The principal change in the new form of a testament-dative is, that no part of the inventory confirmed can be engrossed in it, but merely the amount stated; thus compelling parties who have to exhibit a complete title, to take out a separate extract of the inventory, no one being warranted to pay, transfer, or deliver, unless the particular asset is specially given up in the inventory and confirmed. The author, in the schedule annexed to the bill proposed by him, prescribed that a copy of the inventory, or an excerpt of such part of it as might be required, should be annexed to the testament-dative.

The whole moveable estate of the deceased known at the time must be confirmed, except in the case of a confirmation by an executor-creditor (4th Geo. cap. 98), but by the same statute it is provided, that nothing therein contained shall affect or alter the provision made with respect to special assignations by the Act of 1690, entituled, "Act anent the Confirmation of Testaments." Whole estate must be confirmed.

If an additional inventory is given up, an eik to the testament-dative (in the form approved by the Commissary of Edinburgh, which will be found in the Appendix) may be issued. Eik.

The author suggested in his draft bill that the form of the eik should be fixed by a schedule thereto annexed, in order to secure uniformity. But the form was left out in the Act.

Where any confirmation of the executor of a person who shall be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal court of probate in England, and a copy English or Irish estate.

English or Irish estate.

thereof deposited with the registrar, together with a certified copy of the interlocutor of the Commissary, finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate, or letters of administration, as the case may be, had been granted by the said court of probate. § 12.

By the following section of the Act, the like provisions are made with respect to estate situated in Ireland, and the Court of Probate in Dublin. § 13.

CHAPTER X.

TESTATE SUCCESSION.

VARIOUS KINDS OF TESTAMENTARY DEEDS.

THERE is no particular form, or special technical expressions required by the law of Scotland for the disposal of a man's moveable or personal property after his death. All that is necessary is, that the intention of the deceased be clearly expressed in a writing subscribed by him, which may be either holograph (in his own handwriting), or tested, as it is termed, in the manner explained below.* For example, a holograph, Form.

* A holograph writing is valid, if subscribed by the granter at the end thereof, or at the end of each separate sheet on which it is written. It is preferable that it should be subscribed at the bottom of each page, and all marginal additions or alterations should likewise be subscribed. No witnesses are required, and it is not indispensable that the place and date of execution be mentioned, though for various purposes these should also be stated.

Where the testamentary writing is not holograph, it is absolutely necessary, not only that it should be subscribed by the granter, as in the case of holograph writings, but also that it be subscribed by two male persons above fourteen years of age, as witnesses; that these should subscribe their names at the end of the deed, and that the full name and designation of the writer of the deed, the number of pages upon which it is written, and the full names and designations of the witnesses, should be set forth in the testing clause. The place and date of signing, although not statutory requisites, should also be mentioned. The testing clause will run thus:—

"IN WITNESS WHEREOF, these presents, written on this and the two pre-
"ceding pages by A. B., clerk to C. D., Writer to the Signet, Edinburgh, are
"subscribed by me at Edinburgh, the 26th day of November 1858, before
"these witnesses—E. F., merchant, residing in No. George Street, Edin-
"burgh, and the said C. D.

(Signed) "E. F., *witness*." (Signed) "X. Y.," (*granter*).
"C. D., *witness*."

Form. or tested writing, in such words as these, "I hereby leave and "bequeath one hundred pounds to C. D. at my death," would be an effectual legacy, claimable from the executors of the granter, or which, failing any prior and preferable applicant, would enable the legatee to get himself confirmed executor of the legator. Again, a holograph or tested writing in such terms as the following:—"It is my wish that, in the event of "my death, C. D. shall receive all the personal estate and effects "of which I may die possessed, burdened only with my debts, "and the following legacies, namely,—to my friend G. F. the "sum of twenty pounds; to G. H. my gold watch," &c. &c., will constitute C. D. residuary legatee, and create good claims against him by the legatees for the money or effects left to them respectively. From the difficulty, however, that most persons who are not of the legal profession feel in stating precisely their wishes in regard to the distribution of their property after their decease, and their ignorance of its legal distribution, testamentary writings prepared and executed by the parties themselves, have in numerous cases given rise to uncertainty and litigation.

Kinds. Formal testamentary writings may be in any of the following styles:—

1. A mere nomination of executors.
2. The last will and testament.
3. The special disposition and settlement.

Each of the witnesses should, as above, for the sake of distinctness, add the word "witness" after his name.

As a holograph deed without witnesses does not prove its own date, wherever heritable property is conveyed, the disposition should be executed before witnesses, to prevent challenge on the ground of death-bed.—See Bell's Dictionary and Digest, *voce* "Death-bed."

4. The general trust-disposition and settlement; and Kinds.

5. Codicils.

Examples will be found in the Appendix.

1. *Nomination of Executors.*—This testamentary writ merely selects the person or persons on whom the granter wishes to devolve the office of executor, leaving him to distribute the estate according to the same rules that would have prevailed had he died intestate. The propriety and convenience of such nomination may occur in various instances—such, for example, as that of a party dying leaving a widow unaccustomed to business, and a family of pupils or minors. Were he to leave no nomination of executors, the duty of managing, realizing, and ultimately distributing his estate would devolve on his relict, or one or more of his inexperienced family, aided, it might be, by a tutor or curator, whose appointment would depend very much upon accident. A nomination of executors provides for this unsatisfactory state of management. It was resorted to by Miss Innes of Stow with reference to her immense fortune, where she was imperfectly informed who by law and propinquity to her were entitled to succeed her. Such nomination prevents any interregnum in the management of the estate of the deceased. It saves a considerable amount of inventory duty, viz., the difference between the duty on testate and intestate succession. And lastly, the executor nominated by the defunct does not require to find caution, a matter frequently attended with difficulty and unpleasantness. Nomination of executors.

2. *The Last Will and Testament.*—This writing expresses the dying wishes of the testator with respect to the realization and distribution of his personal estate, and, as already mentioned, there is no particular or prescribed form in which such wishes may be expressed. A last will may be in terms of great Last will and testament.

solemnity, or it may be in a letter to a friend or relative, or a few hasty words written *in introitu mortis*.

By whom. A last will may be executed up to the very last moment of life, if the party retains his consciousness and senses. A married woman may execute a will without the consent or knowledge of her husband, a minor without the knowledge or consent of his parents or guardians, but not a pupil. The right a wife had to bequeath to any of her own children or relatives, or to any stranger she might think fit, her share of the goods in communion between her and her husband at the time of her death, has been abrogated by the Act 18th Vict. cap. 23, § 6.

Special disposition. 3. *The Special Disposition and Settlement.*—This form is resorted to where the testator wishes to convey the whole of both his heritable and moveable property to some particular individual, either for his sole and absolute use and benefit, or burdened with provisions or bequests in favour of others.

General trust-disposition. 4. *The General Trust-Disposition and Settlement.*—It is by means of such a deed that a party possessed of heritable and moveable property, or who may prospectively be possessed of such at the time of his death, conveys the same not to the beneficiaries direct, as in the case of the special disposition and settlement, but to third parties, as trustees for their behoof. This is the form of testamentary writing generally in use with persons who are, or are likely to be, at the time of their death possessed of property to some amount, either heritable or moveable, or both, and affords the greatest facilities, by means of full and distinct expression of the purposes of the trust, and of the powers conferred on the trustees, to carry out the intentions of the granter.

Testate Succession.

5. *Codicils.*—Any alterations which a party may wish to make on any of the foregoing testamentary writings may be expressed in a codicil or postscript, without the necessity of re-executing the original testamentary writ. Codicils are generally written in continuity of the original writing, but may be on any separate paper. Codicils.

It has been mentioned that no particular words are necessary in the case of a testamentary writing respecting personal or moveable estate. The same does not hold where real or heritable estate has to be conveyed. The word "dispone" is essential, as shewn in the forms of special disposition and settlement, and general trust-disposition and settlement. See Henderson *v.* Selkrig, 10th June 1795; Robertson's Creditors *v.* Mason's Disponees, 9th December 1795; Galloway, 12th January 1802; Brown *v.* Henderson, 3d December 1805; Ross *v.* Ross's Trustees, 4th July 1809; Welsh *v.* Cairnie, 28th June 1809; Crawford *v.* E. of Dundonald, 22d May 1838. Heritable estate.

The general rule may be stated to be, that last wills and also codicils, Nos. 1, 2, and 5 of the above enumeration, do not require to be written on stamped paper; but that the special disposition and settlement, and the general trust-disposition and settlement, Nos. 3 and 4 of the enumeration, should be written on deed stamps, in conformity with their length. Want of stamps, however, does not infer any nullity in the testamentary deed or writing, and can be supplied on application to the Inland Revenue Office after the death of the testator, on payment of a small penalty. Stamps.

It is a question of constant occurrence whether a last will, a special disposition and settlement, or a general trust-disposition and settlement, contains a nomination of executors expressed or implied. The proper words are—"I hereby nominate and What equivalent to nomination of executors.

What equivalent to nomination of executors.

" appoint A. B. to be my executor;" but where words are used implying that executorial powers are conferred on any party, it is not indispensable that he should be specially designated " executor." Thus, supposing a testator says in his last will— " I look to A. B. for carrying these my intentions into full " effect," or " Mr. A. B. will, I trust, take the trouble of realizing " and distributing my estate in the manner I have directed," or where there is a general trust-disposition and settlement evidently containing power to the trustees to ingather and distribute the estate among the beneficiaries, the want of the particular word " executor " does not prevent the party on whom executorial powers are conferred obtaining himself confirmed as executor-nominate, without finding caution. See Ross's Trustees, 9th March 1833; Lord Fullarton, Outer House, not reported.

Title to sue.

A nomination of executors, like a decree-dative, confers a title to sue, but not to uplift.

In what has been stated reference is made to testamentary writings by persons domiciled in Scotland at the time of making the same, who executed them in Scotland, and who died domiciled in Scotland.

When testator not domiciled in Scotland.

Where the testamentary writing is that of a person having his domicile furth of Scotland, his last will and settlement must be executed agreeably to the forms of the law of his domicile, in order to transmit or bequeath his personal property in Scotland. The Scotch form, if differing from that of his actual domicile, will not answer. Thus by the law of England, which prevails in Ireland, in India, in Australia, in the West Indies, and all the British Colonies, a holograph will, unless signed before two witnesses, is invalid in these countries, and therefore inoperative in Scotland. As a will, however, having a testing clause, and executed before witnesses according to the forms used in Scot-

land, is in conformity with the requisites of the Act 1st Vict. cap. 26, respecting the execution of English wills, the same will be valid in England and elsewhere, in whatever part of Great Britain and Ireland, or the British Colonies, the testator may have had his domicile.*

Heritable property, wherever situated, must always be devised or conveyed by the forms of the law of that country where it is situated. Heritable property.

* In reference to the attestation of English wills and codicils, the statute 1st Vict. cap. 26, § 9, which came into operation on 1st January 1838, enacts, "That no will shall be valid unless it shall be in writing, and executed in "manner hereinafter mentioned; (that is to say,) it shall be signed at the "foot or end thereof by the testator, or by some other person in his presence "and by his direction; and such signature shall be made or acknowledged "by the testator in the presence of two or more witnesses present at the "same time, and such witnesses shall attest and shall subscribe the will in "the presence of the testator; but no form of attestation shall be necessary." Mr. Williams, in his Treatise on the Law of Executors, p. 82, says,—"It is "therefore sufficient if the witnesses, without any attestation clause of any "description, merely subscribe their names. But it must be observed, that "unless there is an attestation clause reciting that the formalities prescribed "by the act have been complied with, the executor cannot obtain probate in "the usual way on his own oath alone, but must produce an affidavit from "one of the attesting witnesses, or some other satisfactory evidence shewing "that the solemnities have been performed as required by the statute." The same author, at page 297, gives the following as an example of an attestation clause reciting that the solemnities required by the statute 1st Vict. cap. 26, § 9, have been complied with:—"Signed and declared by the above-"named testator, as and for his last will and testament, in the presence of us "present at the same time, who, in his presence and in the presence of "each other, have hereunto set our names as witnesses thereto.—John Styles. "Richard Nokes." In the case of the witnesses, as well as of the testator, a subscription by mark is sufficient.

It has been doubted whether a will or any deed can be executed according to the forms of both England and Scotland. If thought competent, the testing clause, attestation of the witnesses, &c., may be thus:—"In witness whereof,

When change of domicile after making will.

It has been made a question whether a will must be executed according to the law of the domicile of the party at the time of his death, or whether a will executed according to the law of the domicile at the time of making it remains valid, notwithstanding a change of domicile to, and the testator dying in, a country where the law respecting the execution of wills is different from the law of the country where the will was made. Story, in his Conflict of Laws (2d edition), page 675, says—

"But it may be asked, what will be the effect of a change of "domicile after a will or testament is made of personal or "moveable property, if it is valid by the law of the place where "the party was domiciled when it was made, and not valid by "the law of his domicile at the time of his death? The terms "in which the general rule is laid down, would seem sufficiently "to establish the principle, that in such a case the will or tes-"tament is void; for it is the law of his actual domicile at the "time of his death, and not the law of his domicile at the time "of making his will or testament of personal property, which is "to be given. This doctrine is very fully recognised and laid "down by John Voet. If, however, he should afterwards

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"these presents, written on this and the two preceding pages by A. B., clerk "to C. D., Writer to the Signet, Edinburgh, are subscribed by me at Edin-"burgh, the 26th day of November 1858, before these witnesses—E. F., mer-"chant, residing in No. George Street, Edinburgh, and the said C. D.

(Signed) "X. Y. (*granter.*)

"Signed and declared by the above-named testator, as and "for his last will and testament, in the presence of us present "at the same time, who, in his presence, and in the presence of "each other, have hereunto set our names as witnesses thereto."

(Signed) "E. F., merchant, George Street, Edinburgh, *witness.*

„ "C. D., Writer to the Signet, Edinburgh, *witness.*

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" return and resume his domicile where his first will or testa- When change of domicile after making will.
" ment was made, its original validity will revive also."

Mr. Williams, however, in his valuable treatise, is disposed to take a different view of the matter from Judge Story, and says, vol. i. p. 324, *note* (5th edition)—" A question is put in " Story's Conflict of Laws, ch. xi. § 473, as to what will be " the effect of a change of domicile after the will is made, if it " is valid by the law of the place where the testator was domi- " ciled when it was made, and not valid by the law of his " domicile at the time of his death. And that eminent writer " expresses his opinion that the will in such a case is void; for " that it is the law of the actual domicile of the testator at the " time of his death, and not the law of his domicile at the time " of making his will, which is to govern. *Sed quære.*"

Upon the whole, it rather appears that every will should be executed according to the form of the law of the country where, had the succession remained intestate, it would have been distributed; although in many cases this may create disappointment and hardship, from the testator and others trusting to a will previously executed in another place.

Another question of the same description, but one probably involving not so much doubt, arises where a party temporarily residing not within the country of his domicile executes a will according to the form of the law of his temporary residence. Temporary residence.

An opinion has been expressed in a quarter entitled to the highest respect, that a will is valid if executed according to the forms of the law of the granter's temporary residence, at the time of making it, although not in the form necessary by the law of the granter's domicile. The opinion was founded on the case of Leith, 6th June 1848, and also on the cases of Taylor *v.* Scott, 16th July 1847; Macpherson, 19th January

Temporary residence.

1850; and Thomson, 18th December 1851; but the case of Leith only sustained the revocation of a Scotch *mortis causa* deed by a deed in the English form, not the constitution of a will, and the other cases referred to do not appear to bear out the opinion.

Since the decision of the case Bruce *v.* Bruce in 1788, it seems to have been the settled law of Scotland that in the case of intestate succession the rights of parties are to be regulated by the law of the domicile of the deceased at the time of his death, without regard to *lex loci rei sitæ* of his personal effects (Robertson on Pers. Suc., chap. viii.), and it would not apparently be in keeping to give validity to a will altering the legal course of succession, unless the same were executed according to the law of the domicile of the defunct, by which its terms must be construed. [*Vide* Lord Ivory in Thomson's Trustees *v.* Alexander and Others, 18th December 1851.) It is not difficult to perceive that it would be most dangerous to admit of domiciled Scotchmen, by merely walking across the border, having it in their power to execute valid testamentary deeds according to the English form, and in disregard of the rules and solemnities required by the law of their own country. Yet such would be the case were the opinion alluded to to regulate the matter.

Thelluson Act.

The Act 39th and 40th Geo. III. cap. 98, commonly called the Thelluson Act, restraining the accumulation of personal property in Scotland by testamentary deeds beyond certain periods, requires attention. By the Act 11th and 12th Vict. cap. 36, § 41, the Act was extended to heritage. For Thelluson Act, see Appendix; see also Ogilvie's Trustees *v.* Kirk-Session of Dundee, and Keith's Trustees *v.* Keith, *infra*.

In illustration of other questions that may arise with respect

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to the validity of testamentary deeds, the following selection of decisions has been made :—

Cases.

Colville v. *Lauder.*—A native of Scotland went to the West Indies to follow his trade, leaving his wife in Scotland; and after being four years in the West Indies he went to the United States, where he remained about half a year, and then went to Canada, where he died a few months afterwards—Held that a testamentary paper, written by him on sailing to the United States, was not sufficient to exclude the *jus relictæ*, in respect he had not lost his Scottish domicile. (15th January 1800.) Doubted, Rob. on Pers. Suc., 166, 188.

Crichton.—A testamentary deed which was not holograph, and did not specify the name of the writer or the designation of the witnesses, held improbative, and not effectual to convey moveables. (12th January 1802.) *Vide* Dundas *v.* Lowis, 13th May 1807, and Buchan *v.* Harper, 18th October 1831, *infra.*

Wightman v. *De Lisle's Trustees.*—A Scotsman domiciled in the East Indies executed there a will, bequeathing his funds to trustees for payment of, *inter alia*, a legacy to his heir-at-law, and thereafter he acquired real estate in India—Held that the right of the heir-at-law must be regulated by the law of England, and that, agreeably thereto, the heir was entitled to take the real estate as not falling under the will, and also the legacy, and was not bound to relieve the trustees of any of the debts, although contracted in relation to the real estate. (16th June 1802.)

Henderson v. *Wilson.*—A will disposing of the personal estate sustained, although containing a reference to the destination of heirs called by deed conveying the testator's heritage, which, owing to defects in point of form, was found insufficient for that purpose. (18th January 1803.)

Cases

Dundas v. *Lowis.*—A testatrix conveyed her effects to trustees with directions, and declaring that they should "hold "any additional directions which I may give them by a writing under my hand as part of this trust-deed"—Held that codicils bequeathing legacies which were not holograph, nor tested, although signed by the testator, were not effectual. (13th May 1807.) *Vide* Crichton, 12th January 1802, *supra.*

Bowie v. *Bowie.*—A native of Scotland executed in India a testament in the English form, and, on his return to Scotland, he bought an heritable estate, and executed a trust-deed of settlement in the Scotch form; and, after payment of the debts and provisions in that deed, there remained only a residue of the heritable estate—Held, that it belonged to the heirs-at-law, and not to parties claiming under the testament. (16th January 1811.)

Govan v. *Setons.*—It is not competent to burden heritable property with provisions to younger children in a testament. (28th January 1812.) "This rule applies only in a question "with the heir-at-law."—More, 342.

Munro v. *Coutts, &c.*—Testator executes a trust-deed of the whole of his property, and also a will in the English form, giving the whole of his property not situated in Scotland to the trustees for the uses of the trust. The will proved in the English Ecclesiastical Court. Testator, afterwards wishing to alter his settlement in regard to the personal or moveable property, writes and signs two papers conceived in testamentary language, which he called his codicils; one of which he sends to his agent, with whom he was corresponding on the subject of the intended alteration, and lays up the other in his repositories. Testator dies before a more formal instrument is prepared; but no pretence that he was prevented by sudden death from executing it. The Court

of Session decides that the paper sent to the agent was in itself testamentary, but this decision reversed on appeal. (3d July 1813.) *Vide* Stainton *v.* Stainton, 17th January 1828, *infra.* Cases.

Robertson v. *Robertson.*—Held, 1. That a will made in India was to be interpreted according to the law of the place where it was made, and not by the rules of the law of Scotland. 2. That, according to the construction of the law of the place, the testator did not intend to convey heritage situated in Scotland; and, 3. That, while the heir was entitled by the law of Scotland to take the heritage, he was not excluded by the rule of approbate and reprobate from taking a share of the personal property bequeathed to him by the will. (16th February 1816.)

M'Intyre v. *M'Farlane.* — A codicil, partly holograph and partly not, signed by the testator, but not tested, relative to a trust-deed duly executed, directing the trustees to pay any legacy specified in any writing under his hand, bequeathing a sum of money to trustees in the part not holograph—Held effectual. (1st March 1821.) *Vide* Dundas *v.* Lowis, 13th May 1807, *supra.*

Hill, &c. v. *Burns, &c.*—A trust-settlement, *mortis causa,* wherein the trustees are appointed to lay out the residue of the testator's fortune, after the special purposes of the trust are accomplished, "in aid of the institution for charitable and benevolent purposes, established, or to be established, in the city of Glasgow, or neighbourhood thereof, and that in such way and manner, and in such proportions of the principal or capital, or of the interest or annual proceeds of the sum to be appropriated, as to my said trustees and their foresaids shall seem proper; declaring, as I hereby expressly provide and declare, that they shall be the sole judges of the appropriation of the said residue for the purposes aforesaid"—Found to be effectual. (14th December 1824.)

Cases.

Crichton v. *Grierson or Crichton.*—1. A trust-settlement, *mortis causa*, wherein the trustees are directed to apply the residue of the testator's fortune, after the special purposes of the trust are accomplished, "in such charitable purposes, and in "bequests to such of my friends and relations as may be pointed "out by my said dearly beloved wife, with the approbation of "the majority of my said trustees, &c."—Found to be effectual. 2. The heir-at-law, and one of the next of kin of the deceased, having been named as a trustee, and having acted and taken benefit under the deed, not thereby barred from objecting to it as containing no effectual destination of the residuary funds. (12th May 1826; affirmed 1828.)

Brack v. *Hogg.*—A deed executed according to the Scottish form by a proprietor of landed property in Scotland residing abroad, conveying his property to a trustee for the purpose of paying to him the rents during his life, and after his death disponing it to such persons as he should specify in his will, does not require delivery, and is effectual to transmit the property to the person named in the will, although the will be not tested in the Scotch form. (23d November 1827; affirmed 25th February 1831.)

Stainton v. *Stainton.* — A party executed a trust-deed for behoof of such persons as he might appoint by any writing under his hand, though informal, and a relative deed of settlement, reserving power to alter; he afterwards gave holograph signed instructions to prepare a new deed, the draft of which was sent to him while confined to bed by indisposition, and he was seized one or two days thereafter with a severe illness, of which he died, without executing any new regular deed, or initialing the draft—Held that the instructions were not effectual as a testament. (17th January 1828.) *Vide* Munro *v.* Coutts, 3d July 1813, *ante.*

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Cases.

Buchan v. *Harper.*—A lady by a testament appointed an executor, "subject to the payment of such bequests as I may "instruct him to pay, in a letter signed by me of this date, to "the several persons therein named;" declaring, "that after "these several persons therein named have been paid and dis- "charged their several legacies," the whole residue should belong to the executor; she died two days thereafter, leaving the deed in her repositories, with a letter within it, bearing the same date, and signed by her, but not holograph nor tested, directing the executor to pay certain legacies; it was offered to be proved that the letter had been signed *simul ac semel* with the testament, and was the one there referred to—Held, that the letter not being probative in terms of the Act 1681, was not effectual against the executor; and that the offer of proof was not relevant. (27th May 1828.) Reversed and remitted with an issue (18th October 1831;) (10th March 1832; 16th July 1832.) *Vide* Crichton, 12th January 1802, *supra.*

Dundas v. *Dundas.*—A Scotchman included English property in a trust-deed executed in Scotland, which the deed was ineffectual to convey by the law of England, as not being tested by three witnesses—Held, in a question as to whether the heir could take the English estate, and also claim under the trust-deed, that in regard to the matter of intention to pass the English property, it was to be construed according to the rules of the law of Scotland. (14th January 1829; affirmed 22d December 1830.)

Ker v. *Lady E. Ker's Trustees.*—A deed of nomination and instructions executed in England, and probative by the law of that country, but not by that of Scotland, relative to a trust-disposition of land in Scotland, is effectual. (24th February 1829.)

Cases.

Cameron v. *Mackie.*—1. A trust-disposition in the Scotch form of all heritage of which a party should die possessed, and referring to trust uses, as specified in any will executed or to be executed in the English form, constitutes with such will an effectual trust-conveyance of heritage in Scotland. 2. A Scotch trust-disposition of heritage cannot be revoked by an English will not probative according to the law of Scotland (*vide* Leith's Trustees *v.* Sir George Leith, 6th June 1848, *infra*). 3. The legal effect of a combined trust-deed in the Scotch form, and a will, is a question to be decided by the law of Scotland, and not of England. (19th May 1831; affirmed 29th August 1833.)

Gillespie v. *Donaldson's Trustees.*—A testator by his deed of settlement declared that all legacies should be effectual which he should bequeath by separate writings or memorandums, "although the same be not formally executed, provided the "same express my will and intention, and are written, dated, "and signed by me;" he left two holograph documents, bequeathing legacies, one consisting of a single sheet, the first page of which was dated, but not signed, and the second page, bearing a subsequent date, was signed; and the other document set forth his name and designation, and was dated, but not subscribed—Held, that the first page of the former of these documents was in law signed by the signature attached to the second page; and that the insertion of his name and designation in the other document was a sufficient compliance with the declaration, and therefore the several legacies were due. (22d December 1831.) But see Dunlop *v.* Dunlop, 11th June 1839, *infra.*

Blackett v. *Gilchrist.*—A deed executed by a party domiciled in England, disponing, according to the law of Scotland, a landed estate in Scotland, burdened with a sum of money in favour of parties then resident in England; must be

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construed according to the law of Scotland. (29th May 1832.) Cases.

Campbell v. *Sir T. Munro.*—A Scotsman died resident in India, after having executed a deed of settlement whilst in England, in the English form, by which he directed the residue of his estates, heritable and moveable, to be invested, under entail, in lands to his eldest son, as institute, and a series of heirs; and the deed being ineffectual to convey certain heritage in Scotland, this was claimed by his eldest son as his heir-at-law —Held, under reference to the law of England, that the deed of settlement was so expressed as to put the heir-at-law to his election, and to deprive him of all benefit under the will, if he took up the Scotch heritage as heir-at-law. (23d December 1836.)

Dunlop v. *Dunlop.*—A holograph writing, commencing with the name of the party, and purporting to be a general distribution of his estate as his last will and settlement, but wanting the subscription, and being in other respects incomplete—Held invalid; and observed, that if the case of Gillespie is to be regarded as a sound decision, it goes as far as it is possible to go. (11th June 1839.) *Vide* Gillespie *v.* Donaldson's Trustees, 22d December 1831, *supra.*

Black v. *Watson.*—A party left three deeds of settlement, executed at intervals, which successively referred to and ratified each other, and disposed of his whole heritable and moveable estate—Held that they were to be considered as constituting one settlement, and that the heirs-at-law could not reduce the last on the head of death-bed, without forfeiting the provisions in their favour contained in a prior unchallenged deed. (9th February 1841.)

Mason v. *Skinner.*—A testament reduced on the ground of its provisions being inextricable. (6th March 1844.) *Vide*

Cases. the leading decisions founded on in this case, M'Culloch *v.* M'Culloch (28th November 1752), where settlements were reduced at the instance of the heirs, on the ground that the provisions were ridiculous, unintelligible, inexplicable, and *contra bonos mores;* and M'Nair *v.* M'Nair (18th May 1791), where a trust-deed was challenged as irrational, whimsical, and in certain events inextricable, and *ultra vires*, was held effectual so long as not inextricable.—Bell's Illustrations, § 1884.

Ogilvie's Trustees v. *Kirk-Session of Dundee.*—A person, by a deed of settlement, conveyed his estates, heritable and moveable, to trustees, with power to sell the heritage or not, as they should think proper; and, after payment of debts and legacies, they were directed to give to the Kirk-Session of Dundee £2000, or the "balance" of the estate, which was to be invested in government stock, and the dividends to be invested in the funds, and so continue accumulating for one hundred years, when the sum accumulated should be appropriated for the building and establishing an hospital for poor boys in Dundee—Held, that the residue was moveable; that the direction to accumulate for one hundred years was struck at by the Thelusson Act 39th and 40th Geo. III. cap. 98, and did not fall under the exception as to heritage in the act; that the illegality of the provision to accumulate did not invalidate the provision in other respects; and that the Kirk-Session, as residuary legatees, were therefore entitled to the same, in virtue of the provision in the statute,—that in every case where the accumulation shall be directed otherwise than as it permits, the rents and produce shall "go to and be received by such person "or persons as would have been entitled thereto if such accumu- "lation had not been directed." (12th February 1846.) *Vide* Thelusson Act, in Appendix.

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Horseburgh v. *Horseburgh.*—A lady executed a *mortis causa* deed, by which she appointed trustees to pay certain legacies and annuities, and to convey the residue to a cousin. She afterwards appended to it various codicils; granted a disposition of a house to the residuary legatee; and executed another holograph codicil on a separate paper. They were all found in her escritoire after her death, with a paper folded as a letter, and addressed to a relative, commencing thus:—"Being at "present in good health, I think it my duty to dispose of my "property in as few words as I can;" and then followed various bequests, many of the same amount and to the same persons as had previously been bequeathed by the trust-deed and prior codicils; and it concluded with the words, "This is all I at "present recollect"—Held, that this paper must receive full effect as a testamentary writing. (12th January 1847.) Cases.

Annandale v. *M'Niven.*—A husband, by his deed of settlement, directed his trustees to give his wife the liferent of his estate, in place of her legal provisions, and on her "death," to divide the fee among certain parties named. The wife, on his death, repudiated the settlement, and claimed her legal provisions—Held, that the funds were now in the same situation as if she had renounced her liferent, and therefore all interested were entitled to an immediate division. (9th June 1847.)

Leith's Trustees v. *Sir George Leith.*—Held by the whole Court, that a trust-deed of settlement executed in Scotland may be revoked by an English will, even as to heritage, but that the will in question was not intended to operate as a revocation. (6th June 1848.) *Vide* Cameron *v.* Mackie, *supra.*

Rankine v. *Reid.*—A testator, by his trust-settlement, directed his trustees to apply the residue of his estate to such purposes as he should point out "by any deed, letter, or memo-

Cases. " randum of instructions to be executed by me, at any time of " my life, or even on deathbed "—Held that a subsequent codicil which was subscribed by him, but was neither holograph nor tested, was not a valid exercise of his power, and could not receive effect as a testamentary writing. (7th February 1849.)

Grant v. *Stoddart.*—Case of various successive testaments. (27th February 1849.)

Macpherson v. *Tytler.*—A proprietor of a Scotch estate executed a will in England in the English form, applicable to his funds situated there, in which he directed his executors to consolidate into one fund the whole of his fortune, and lay it out in the purchase of lands in Scotland, to be entailed on a certain series of heirs. The executor having paid to the first heir the first year's proceeds of the English funds, and this having been challenged by the next succeeding heir—Held that the will must be interpreted according to the law of England, and that under it the first year's proceeds must be restored to the estate. (19th January 1850.) Reversed (11th June 1852).

M'Millan v. *M'Millan.*—A husband wrote the following docquet upon a leaf of his Bible:—" Lownfoot, 26th March " 1847.—This is to certify that William M'Millan and Jane " Bell makes this agreement, that the longest liver is to have " all that remains after our debts are paid. We take God and " the Bible for our witness." He signed the docquet, and it was also subscribed by his wife—Held, upon his predecease, that this was an effectual testamentary disposal of his moveable property. (28th November 1850.)

Baron Norton's Trustees v. *Lady Menzies.*—A party possessed of heritable and moveable estates in both England and Scotland, left two testamentary writings—the one a holograph will in the English form, and the other a trust-deed, dated seven

days after the will, executed according to the law of Scotland, containing a clause of revocation of all former testamentary deeds, but from which the will was specially excepted. By the will, he directed a portion of his heritable estate in Scotland to be sold, and the proceeds to be equally divided among his children; and by the trust-deed, he appointed the residue of his whole estates (including the lands mentioned in the will) to be divided according to any writing he might leave under his hand; and failing such writing, among his children, in the proportions of two shares to each son, and one share to each daughter—Held that the testator contemplated the two deeds as forming together a complete settlement of his estates therein mentioned, which superseded the direction contained in the trust-deed in so far as that estate was concerned, and that, therefore, the estate fell to be divided equally among all the children, in terms of the direction in the will. (4th June 1851.) Cases.

Thomson's Trustees v. *Alexander*.—A native of Scotland died domiciled in Newfoundland, leaving a will, which, being obscure in its terms, was remitted by the Lord Ordinary to an English lawyer, for his opinion as to its import; and he having given his opinion thereon, the Lord Ordinary remitted it back to him to say whether the construction of it was a question of English law exclusively? He answered that it was not so, and did not depend on any technical rule of English practice, but that it was a question on which the judge of any Court conversant with the language of the will was entitled and bound to give its judgment—Held that the Court were entitled to construe the will, and were not bound to adopt the construction of the English lawyer. (18th December 1851.)

Rainsford v. *Maxwell* (*Hanny's Trustees*).—Held that a deed executed at Vienna in the Scottish form, by a party who

Cases. resided in Germany for many years but was possessed of a land estate in Scotland, in favour of testamentary trustees resident in Scotland, and which was to receive effect there, especially as to the residue (which was in question), was to be construed by the law of Scotland. (7th February 1852.)

Fergusson v. *Marjoribanks.*—Question in special circumstances, whether a settlement was to be construed according to the law of Scotland, or of Jamaica—Held, that although the testator died domiciled in Jamaica, the settlement must be construed according to the law of Scotland. (1st April 1853.)

Landells or Selkirk v. *Law and others.*—A husband died leaving a trust-disposition and deed of settlement. The day after the funeral his widow subscribed a minute homologating and accepting it in lieu of her legal rights, and continued for two years receiving from the trustees sums for maintenance. In a reduction, she was held entitled to recall her consent, and to recur to her legal rights. (27th February 1854.)

Bank of Scotland v. *Hall.*—A husband and wife who had been married in Scotland, resided there two years and then went to England, where they also resided two years. The wife then returned alone to Scotland, where she died after two years, leaving a trust-settlement, dated a year prior to her death. At the date of the marriage, the wife had £2000 heritably secured in Scotland. Before going to England with her husband, she uplifted the £2000, gave some of it to her husband, and deposited the balance in a Scotch bank in her own name. She operated on this account till within a few months of her death, the balance then remaining being £1000. A competition having arisen as to the £1000 between the surviving husband and the trustees under the wife's settlement, in which it was pleaded *inter alia*, that the fund *in medio* was a *surrogatum* for the money previously contained in the heritable security—Held

that this competition was to be determined by the law of England. (12th July 1854.) Cases.

Keith's Trustees v. *Keith.*—Held that the direction in the trust deed for accumulating the rents, profits, and issues of his heritable and moveable estate, were null and void under the Thelluson Act (39th and 40th Geo. III. cap. 98), in regard to his whole heritable and moveable estate (except the heritable estate in Scotland), from and after twenty-one years after the death of the deceased Viscount, and therefore from the year 1844, and that the accumulations from this latter date fell to be divided equally among his two daughters as his representatives *ab intestato.* Held also, that the 41st section of the Act 11th and 12th Vict. cap. 36, which repealed the exception in the Thelluson Act as to heritage in Scotland, did not, and could not be construed to apply to deeds executed previously to the date of the Entail Act, so as to strike at vested interests, but only to dispositions of heritage containing directions for accumulation executed subsequent to the date of the Act (August 1848). (17th July 1857.)

Magistrates of Dundee v. *Morris and others.*—Held by the House of Lords (*reversing the judgment of the Court of Session*), in reference to holograph writings found in the repositories of a deceased, expressive of his wishes to establish an hospital in Dundee for boys, that they were of a testamentary nature, and effective to carry out his intentions; and that, though the writings contained deletions apparently of an important nature, as if recalling his wishes in regard to the hospital, such deletions had been made, not *ex proposito*, but accidentally; and accordingly, that they were to be disregarded, and effect given to the intentions as indicated by the writings, and a remit made to the Court of Session to frame a scheme for the establishment of the hospital. (11th May 1858.)

Cases.

Laurie, &c. v. *Laurie, &c.*—A husband and wife executed, in favour of their children, a settlement of their heritable and moveable property, in the former of which the husband was infeft. The deed was holograph of the husband, with the exception of a few words relating to the nomination of executors, which were written by the wife. The testators named and described themselves at the commencement as spouses, but without any more specific designation; and the testing clause bore—"This our latter will written with our own hands." The landed property was described by name, and the farm stocking and furniture on a particular farm were conveyed. In a declarator, at the instance of the husband's heir-at-law, to have it found that the deed was improbative and invalid—Held (1.) That it must be considered a holograph writ, and entitled to the privileges of such. (2.) That, even were it not holograph, there was enough *in gremio* of it to satisfy the requirements of the Act 1681 cap. 5, as to the name and designation of the writers. (14th January 1859.)

The construction put upon testamentary deeds scarcely falls within the scope of this chapter, which is more immediately intended to indicate what writings may be confirmed by the Commissary agreeably to the law of Scotland.

For further information on the whole matter, reference is made to Erskine, book iii. tit. 9; Bell's Commentaries by Shaw, book ii., Chap. xiv.; Duff on Deeds (moveables), Chap. iii.; Bell's Dictionary and Digest, *voce* testament, and authorities there referred to; Story's Conflict of Laws, Chap. xi., &c.; Robertson on Personal Succession, *passim;* Brown's Synopsis, *voce* Confirmation of Executors, Executors, Testament, &c.; Shaw's Digest, *voce* Executor, Testament, Succession, Foreign.

CHAPTER XI.

TESTAMENT TESTAMENTAR.

Inventory and oath.

THE executor-nominate of the deceased wanting a testament testamentar, must first lodge with the commissary clerk a full and complete inventory of the personal estate of the defunct, together with an oath to its correctness, all agreeably to what has been explained under Chapter VII. The oath having to represent another species of title from that of an executor-dative, will be so far different. A form of an oath by an executor-nominate, recommended by the Inland Revenue, and so far in conformity with the Commissaries' instructions of 31st December 1823, will be found in the Appendix.

Form of oath.

Writings.

There must also be lodged with the commissary clerk the testamentary writings founded on by the executor, and any other writings relating to the disposal of the deceased's personal estate or effects, or any part thereof.

Testament testamentar.

By the testament testamentar, which, like the testament-dative, is also termed a confirmation, the nomination of executors by the deceased is ratified, approved, and confirmed, and full power is given and committed to them to uplift, receive, administer, and dispose of his personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate is known to belong. A form of the testament testamentar is prescribed by § 10 and schedule E of the Act of 1858.

Form.

Amount of inventory only to be specified.

By that form, differing from that suggested by the author, the amount of the inventory, and not the particular items of which it consists, is mentioned,—thus compelling parties to

Effect.

obtain a separate extract of the inventory for exhibition along with the confirmation as their title, no one, as already mentioned in the case of a testament-dative, being warranted to pay transfer or deliver, unless the particular asset is specially given up in the inventory confirmed.

Duty of commissary clerk.

The testament testamentar is issued by the commissary clerk, on his being satisfied that a nomination of executors has been made by the defunct in due form of law, in favour of the parties claiming the office. For this purpose it is his duty carefully to examine any testamentary writings produced to him, as well as the inventory and relative oath, and to see that the whole correspond. In cases of doubt or difficulty, he should require the parties to obtain special directions and authority to him from the Commissary before issuing confirmation. A form of a petition for that purpose will be found in the Appendix.

Directions to him.

Responsibility of clerk.

Debtors being in safety, and indeed obliged to pay on production of a confirmation under the hand of the commissary clerk or his depute (Buchanan *v.* Bank of Scotland, 29th November 1842), an office of great importance and responsibility is thus conferred on commissary clerks, by their unlimited power of issuing testaments testamentar upon their own judgment, and the notion that such writs may with propriety be issued *periculo petentis* is most erroneous.

Substitute or assumed executors.

A testament testamentar may be issued either in favour of the executors specially named by the deceased himself, by a writing under his own hand, or in favour of parties indicated by him, such as the "heir" * of the last surviving executor named by him, or in favour of executors assumed by virtue of powers conferred by the deceased.

* The word is considered to mean the heir-at-law, not the heir in moveables.

Testament Testamentar.

Registration of writings.

The testamentary writings referred to in the oath to the inventory of the personal estate of the deceased, and in the confirmation, fall to be recorded in the Commissary Court Books (48th Geo. III. cap. 149, § 38), and returned to the ingiver.

Where executor dead.

Where any of the executors named by the deceased die before the inventory of his personal estate is given up and deponed to, the fact of their death must be mentioned in the oath.

Where executor declines.

Where any of the executors have declined to accept, this should also be deponed to by the executor requiring confirmation, and proof of the declinature, such as a letter by the executor declining, or the minute of a meeting at which he has been present, should be required by the commissary clerk. This rule has been found in practice to be a great safeguard against misconceptions and misrepresentations, as to the party really entitled to the office of executor.

Probate.

In England, however, probate is granted to the executor *primo venienti.*

Where executor absent.

It sometimes happens that it is very desirable for the preservation and management of the estate, that confirmation should be granted in favour of one or more executors resident in this country, without waiting to hear whether some other executor named by the deceased, and who is abroad at the time, will accept of the office or not. In such cases, the Commissary of Edinburgh has been in use to authorise a testament testamentar to be issued in favour of the executors at home, provided that on the report by the clerk of Court he was satisfied with their respectability, and that the estate would suffer from delay.

Whole estate must be confirmed.

As in the case of intestate succession, the whole moveable estate of the deceased known at the time of giving up the inventory, and applying for confirmation thereof, must be confirmed (4th Geo. IV. cap. 98).

Where executor-nominate dies without confirmation.

In stating the rules of succession in moveables (Chapter IV.), it has been mentioned that, under the Act 4th Geo. IV. cap. 98, "In all cases of intestate succession where any person "or persons who at the period of the death of the intestate, "being next of kin, shall die before confirmation be expede, "the right of such next of kin shall transmit to his or her "representatives, so that confirmation may and shall be granted "to such representatives, in the same manner as confirmation "might have been granted to such next of kin immediately "upon the death of such intestate." By the law of testate succession, the right of the executor and other beneficiaries vests by the death of the granter of the last will and settlement; but if the executor, he being a beneficiary, dies without expeding a testament testamentar in his own favour, his "represen-"tative," be he next of kin, executor-nominate, husband, creditor, or other person having a legal right to the succession, has no right to obtain a confirmation direct to the first deceaser as such representative would, had it been a case of intestate succession. Thus suppose A dies leaving a last will and settlement in favour of B, nominating him his executor and universal legatory, and that B dies without confirmation intestate, C, the next-of kin of B, must first get himself decerned and confirmed executor-dative of B, including in the inventory the amount or *universitas*, as shewn below,* of the succession to A, and then obtain himself decerned and confirmed executor-dative, *qua*

* "Value of the deceased's interest in the estate of A, under his trust-dis-"position and settlement, dated and recorded "£ .. .. .."

Any enumeration of the particulars of the estate is objectionable, as if such were embodied in the confirmation, it might be understood as conferring a right to uplift the estate of A direct.

Testament Testamentar.

creditor, of A, giving up in the inventory the particulars of which A's personal estate consists, just as B would have done had he given up an inventory during his lifetime. Where executor-nominate dies without confirmation.

The procedure in case of B having left a settlement in favour of C would be precisely the same, with the exception that it would not be necessary for C to present a petition and have himself decerned executor-dative of B, but might expede a testament-testamentar or confirmation to B at once.

Upon this point Professor Bell in his Principles, 4th edition, § 1896, says, "Where one is to confirm to a person who has "died unconfirmed, a double confirmation is necessary. And, 1. "as to testate succession, the executor (or assignee) of an exe- "cutor-nominate who has died without confirming confirms "first to the executor-nominate deceased, from whom he derives "his title to take up the executry of the first defunct—giving "up in his inventory the right and benefit which the deceased "executor-nominate had in the first defunct's estate, and which "he is to take as being in his place; and then, in the second "place, he confirms to the original defunct as disponee or exe- "cutor-creditor, giving up in inventory the debts or effects to "which he means to make up a title."

The opportunity of the Act of last Session passing through Parliament should have been embraced, in order to apply the same facilities for the representatives of persons in right to testate succession making up their title, as the Act of 1823 afforded to the representatives of the next of kin of parties dying intestate without confirmation.

As in the case of intestate succession, it may be necessary to issue an eik to the testament testamentar, in the event of an additional inventory being given up. The form of such an eik Eik.

will be found in the Appendix, subject to the observations made with regard to eiks to testaments-dative.

Estate in England or Ireland.

The same procedure is necessary for rendering a testament testamentar operative in England or Ireland, as is under Chapter IX. explained to be necessary in the case of a testament-dative.

Procedure in testate succession not altered.

The 7th section of the recent statute provides, that nothing therein before contained shall alter or affect the course of procedure now in use before the Commissaries in confirmations of executors-nominate.

CHAPTER XII.

EXECUTOR-CREDITOR.

Petition. WHERE no one having a preferable claim to the office of executor, agreeably to the rules in Chap. VI., petitions to be decerned executor-dative, or applies to be confirmed executor-nominate, it is open to any creditor of the defunct to petition the Commissary to be decerned executor-dative, *qua* creditor. An example of the petition will be found in the Appendix.

Debtor's estate.

Form.

Where liquid ground of debt held. The creditor must produce as his title what is termed a liquid ground of debt, such as a bond or bill by the defunct, or the extract of a decreet by a competent court against him.

Where ground of debt illiquid. If a creditor has only held an open account, or other illiquid claim against the defunct at the time of his death, he must constitute his claim by a decreet in an action at his instance against the next of kin of the defunct, as his representatives. The competency of constituting the debt of the ancestor against the next of kin was established by the statute 1695, chap. 41, which declared, "that in the case of any de-

Act 1695, cap. 41.

"pending cause or clame against a defunct the time of his "deceas, it shall be leisom to the persuer of the said cause or "clame to charge the defunct's nearest of kin to confirm executor "to him within twenty dayes after the charge given, which "charge so execute shall be a passive title against the person "charged, as if he were a vitious intromitter unless he renunce, "and then the charger may proceed to have his debt constitut, "and the hæreditas jacens of moveables declared lyable by a "decreet cognitionis causa, upon the obtaining whereof he may "be decerned executor-dative to the defunct, and so affect his

" moveables in the common form." The necessity of a charge to enter heir is still in force, notwithstanding the Transference of Land Act, 10th and 11th Vict. cap. 48, § 16, which abolishes general and special, and general special charges, with reference to actions of constitution and adjudication. *Vide* Alexander's Analysis (second edition), p. 61, and Turnbull *v.* M'Naughton, 27th June 1850.

Charge to heir.

Publication of petition.

The petition by a creditor has to be published in the same manner as a petition by the next of kin of the defunct, as already explained, and has also, in terms of the Act 4th Geo. IV. cap. 98, § 4, to be publicly notified by an advertisement in the Edinburgh Gazette, at least once, immediately after such application shall be made; in evidence whereof, a copy of the Gazette in which such notice shall have been inserted must be produced in Court before further procedure.

Gazette notice.

Decree-dative *qua* creditor.

If at calling of the petition no opposition is made, decree-dative is pronounced. It is the practice of the commissary clerk of Edinburgh previously to examine the grounds of debt, and to report to the Commissary any objections. If the Commissary considers the objections well founded, he either allows further proof of the debt, or if such cannot be supplied, dismisses the petition, though unopposed by any representative of the defunct.

Objections.

The objections which the commissary clerk considers it his duty to state, are such as that there is no valid liquid ground of debt produced, or, if the petitioner is an assignee, that no title, or an imperfect title, has been produced by him; or that the debt is Prescribed, or the documents not properly stamped.

Conjoining.

Where a co-creditor of the defunct wishes to have himself conjoined with the original petitioner in the decree-dative, it seems competent for such co-creditor to lodge a minute and grounds of debt at or previously to the calling of the petition;

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at least such was the practice under edicts of executry, but see the Commissary's decision in Chalmers' Executry, February 1849, *ante*, page 49. When a creditor wishes to have himself decerned executor-creditor, to the exclusion of a prior applicant, he should present a separate and independent petition. Indeed it appears safer in all cases for a creditor to present a petition for himself. See interlocutors of Commissary Court of Edinburgh in Chalmers' Executry, February 1859—in Appendix. Competition.

The party decerned executor-creditor has next to give up on oath a full and complete inventory of the estate of the defunct, in the same manner as any other executor-dative—the inventory being impressed with stamp duty at the same rate, without regard to the amount of the creditor's debt, and any intention he may have of only expeding a partial confirmation to the estate. Inventory.

It is competent for the executor-creditor either to obtain a testament-dative or confirmation of the whole estate of the defunct, for which he shall be accountable to all other parties interested, or he has the privilege, unlike all other kinds of executors, of merely applying for a partial confirmation, under which he may have warrant and authority only to intromit with and uplift as much and such part of the estate of the defunct as he considers will be sufficient to discharge his own debt and expenses. 4th Geo. IV. cap. 98, § 4. A partial confirmation by an executor-creditor does not carry more than the sum actually confirmed. Lee *v.* Donald, 17th May 1816. Total or partial confirmation.

Caution has to be found by the executor-creditor, like any other executor-dative, and it is open to him to apply for restriction in the same manner as any other executor-dative, particularly if a partial confirmation is proposed to be expede. Caution.

Where estate of ancestor is to be attached for heir's debt.

Where the debtor has only a right of succession to personal property available for the payment of his creditors, it is, under the Act 1695, ch. 41, competent to them to attach the property of the ancestor for payment of their debts, by having themselves decerned executors-creditor, as if they were directly creditors of the deceased. That is to say, where a debtor acquires right to personal property by succession, his creditors have it in their power to make up a title to and realise the estate of his predecessor, notwithstanding the passiveness, and without the active intervention of his next of kin. This privilege was conferred on creditors by the foresaid statute 1695, ch. 41, which statutes and ordains, "that in the case of a moveable estate left by a "defunct, and falling to his nearest of kin, who lyes out, and "doth not confirm the creditors of the said nearest of kin, may "either require the procurator-fiscal to confirm and assign to "them under the perril and pain of his being lyable for the "debt, if he refuse, or they may obtain themselves decerned "executors-dative to the defunct, as if they were creditors to "him: With this provision allwayes, that the creditors of the "defunct, doing diligence to affect the said moveable estate "within year and day of their debitor's deceas, shall alwayes "be preferred to the diligence of the said nearest of kin."

Act 1695, cap. 41.

Year and day.

Where estate distinguishable.

Even after expiration of the year allowed by the statute, and after confirmation, the creditors of the ancestor have a preference over such part of his funds as remains distinguishable. Erskine, book iii. tit. 9, § 35; Bell's Commentaries by Shaw, vol. 2, book ii. chap. 12, § 6.

Practical results.

The leading practical results of the statutes of 1695, 1823, 1855, and 1858, and of the previous law, are the following:—

1. Where the debtor is the deceased party whose estate is to be attached, and where the creditor holds a liquid ground of debt

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from or against him, the creditor may petition the Commissary to be decerned executor-dative *qua* creditor of the defunct, producing the liquid ground of debt as the warrant for the application. Defunct the debtor. Liquid ground.

2. Where again the debtor is the deceased party whose estate is to be attached, but where the creditor does not hold a liquid ground of debt from or against him, the creditor must charge the next of kin of the defunct to enter heir to him, and, on expiration of the twenty days of charge, raise an action at his instance against the next of kin, before a competent court, for the debt. If the next of kin do not appear, the creditor obtains decree in absence, in common form, for payment. If the next of kin make appearance and renounce the succession, which they are entitled to do, the creditor obtains decree against the next of kin, *cognitionis causa tantum*. The extracted decree is in either case a ground of debt against the defunct, sufficient to entitle the creditor to petition the Commissary for his appointment as executor-dative *qua* creditor of the defunct. The same. Illiquid ground.

3. Where it is not the estate of the debtor himself that is to be attached, but where he is living, and it is the estate of his father, or that of some other predecessor to whom the debtor has succeeded but not made up a title by confirmation, that is to be attached, and where the creditor holds a liquid ground of debt from or against such living debtor, the creditor may petition the Commissary of the county where the deceased predecessor died domiciled, or, if furth of Scotland, the Commissary of Edinburgh, to have himself decerned executor-dative of the deceased predecessor *qua* creditor of his next of kin, producing the liquid ground of debt by or against the successor, as the warrant for the application. Defunct the predecessor of debtor. Liquid ground.

4. Where it is not the estate of the debtor himself that is to be attached, but where he is living, and it is the estate of The same. Illiquid ground.

his father or that of some other predecessor to whom the debtor has succeeded but not made up a title by confirmation, that is to be attached, and where the creditor does not hold a liquid ground of debt from or against the debtor so succeeding, he must precede his petition for appointment as executor-dative by obtaining decree against the debtor before a competent court, and producing an extract of the decree as the warrant for his application to be decerned executor-dative of the party whose estate is to be attached, *qua* creditor of his next of kin.

Creditor representative of next of kin.

5. A creditor by a liquid ground of debt of a next of kin who survives an intestate, but dies before expeding confirmation, may, as representative of such next of kin, petition the Commissary of the county where the intestate died domiciled, or, if he died domiciled furth of Scotland, the Commissary of Edinburgh, to have himself decerned executor-dative of the intestate.

Statute of 1855.

6. The statute of 1855 fails to provide how or to what extent the rights and interests thereby conferred may be attached by creditors.

Preference of creditors of ancestor.

As already mentioned in the quotation from the statute of 1695, the creditors of the defunct ancestor doing diligence to affect his moveable estate within year and day of his decease, are preferred to the creditors of his nearest of kin; and even after expiration of the year and day allowed by the statute, and after confirmation, the creditors of the ancestor have a preference over such part of his funds as remain distinguishable.—Bell's Dict. and Digest, *voce* Executor.

If the estate of the ancestor is not distinguishable, the creditors of the ancestor and of the heir rank *pari passu* on the estate of the ancestor after the expiration of a year and day from his death.

By Act of Sederunt 28th February 1662 it was provided,

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" That all creditors of defunct persons using legal diligence at " any time within half an year of the defunct's death, by " citation of the executors and intromitters with the defunct's " goods, or by obtaining themselves decerned and confirmed " executors-creditors, or by citing of any other executors- " creditors confirmed, the saids creditors using any such dili- " gence before the expiry of half ane year, as said is, shall " come in, *pari passu*, with any other creditors who have used " more timely diligence." *Pari passu* preference of creditors *inter se.*

After the expiration of six months from the date of the defunct's death, his creditors are preferable according to the dates of their respective confirmations. After six months.

It is incompetent for any creditor of a deceased debtor, after the date of the first deliverance on a petition for sequestration of his estates, under the Bankruptcy (Scotland) Act, 1856, to be confirmed executor-creditor of the deceased debtor. Act 19th and 20th Vict. cap. 79, § 30. Provisions under Bankrupt Act.

This same statute, section 110, provides that where the sequestration of the estates of a deceased debtor is dated within seven months after his death, any preference or security for any prior debt acquired by legal diligence, on or after the sixtieth day before his death, or subsequent to his death, and any preference or security acquired for a prior debt by any act or deed of the debtor which has not been lawfully completed for a period of more than sixty days before his death, and any confirmation as executor-creditor after the debtor's death, shall in these several cases be of no effect in competition with the trustee; and the estates and effects over which such preferences or securities shall have been obtained, or of which confirmation shall have been expede, shall belong to the trustee—provided that the creditor, who is so deprived of the benefit of his dili-

gence or confirmation, shall have preference for payment, out of the said estates or effects, of the expenses *bonâ fide* incurred by him in such diligence or confirmation.

The Bankrupt Act, by the facilities it affords for attaching and distributing the estates of deceased debtors, has greatly lessened the practice of confirming executors-creditors, and put an end to the difficult questions that arose under such confirmations.

Partial confirmation.

By the Act 4th Geo. IV., cap. 98, § 3 (19th July 1823), it is provided that, "in the case of confirmation by executors-"creditors, such confirmation may be limited to the amount of "the debt and sum confirmed, to which such creditor shall "make oath." And by the Commissary's instructions of 31st December 1823, it is directed, that confirmations by executors-creditors "may (if required) comprehend no more of the inven-"tory recorded than a sum equal in amount to the debt due, "and the expense of confirmation; in other words, it may be a "confirmation to any extent the executor desires. And in "the oath upon the inventory given in to be recorded, such

Oath of verity.

"executors shall depone to the verity of the debt on which "they may have been decerned, in terms of what appears to "be the meaning of this part of the Act." In the case of Greig *v.* Christie, 1st March 1837, however, it was found that confirmation was regularly expede and was not objectionable, in respect of the oath not having deponed to the verity of the debt, as that is not required by 4th Geo. IV., cap. 98. Since that decision, the practice of executors-creditors deponing to the verity of their debt has been discontinued, but the soundness of this decision may be doubted.

Cases.

Lee v. *Donald.*—A creditor partially confirmed is entitled, after a creditor has applied for confirmation *ad omissa*, to be

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conjoined with him; if he applies before confirmation *ad omissa* is carried through. The title of a creditor confirmed *ad omissa* to reduce a decree of preference in favour of a creditor partially confirmed, and to account for what he has drawn beyond the sum confirmed, sustained in *hoc statu*, reserving the effect of any claim of retention by the latter. (17th May 1816.) Cases.

Maitland v. *Sir C. Cockerill.*—An executor-creditor, although not confirmed, has a good title to pursue. Where an estate has been converted into money, after the death of a party, his executor-creditor is entitled to insist to the effect of attaching the money, although originally heritable. (23d November 1827.)

Dickson v. *Barbour.*—Confirmation *qua* executor-creditor, (which is not challenged) is a good title to pursue, without producing the ground of debt. (27th May 1828.)

Duke of Atholl v. *Anderson.*—Although a decree in a multiplepoinding, preferring the claimants according to the priority of their arrestments executed during the lifetime of the common debtor, had become final—yet held that one of them, having subsequently obtained a confirmation as executor-creditor of the common debtor, was preferable to the other claimants; and observed that the doctrine of Erskine, Book ii. tit. xii. § 65, was too broad, while that of Bell, vol. ii. p. 299, was sound. (24th November 1831.)

Wilson v. *Dewar.*—Held that a decree-dative as executor-creditor, not followed by confirmation, does not exclude other creditors from being conjoined and confirmed; and observed, that a joint executor-creditor is not entitled to refuse to concur with the other in applying for confirmation.

CHAPTER XIII.

CONFIRMATION QUOAD NON EXECUTA, AND QUOAD OMISSA ET MALE APPRETIATA.

FIRST. *Quoad non Executa.*

When competent.

IN the case of executors-dative there is no room for a confirmation *quoad non executa* in favour of any other person, because the whole estate of the defunct has become vested in such executor. The same rule holds in the case of an executor-nominate who has confirmed partially, though not wholly, for his own behoof. Where, however, an executor-nominate, merely possessing the office, dies, leaving part of the funds contained in a confirmation in his favour unuplifted or untransferred to himself, a confirmation *quoad non executa* may be resorted to. The parties entitled to claim such confirmation may be stated generally to be the same as would have been entitled to the office of executor had the deceased executor-nominate not accepted of the office. Thus, supposing the defunct has nominated A, whom failing, B, to be his executor, and that A dies leaving part of the defunct's funds untouched, it is competent for B, as substitute executor, to obtain a confirmation in his favour of the defunct's estate, *quoad non executa*. An example of such confirmation will be found in the Appendix. To preserve a proper record of the circumstances under which such confirmation is issued by the commissary clerk, it should be preceded by a petition, by the party wanting the confirmation, to the Commissary, stating the facts of the case, and craving directions and authority to the clerk to issue the confirmation.

Parties entitled.

Where the executry funds have been realised by the

and *Quoad Omissa et Male Appretiata.*

executor, and commingled with his own, a mere claim of debt exists against him at the instance of beneficiaries or creditors of the defunct. Where funds realised.

Where the executry funds have been realised by the executor, and deposited in bank, or otherwise invested, as belonging to him *qua* such, or where they have been transferred to him as executor, it is competent for those interested in the succession, on the occasion of the executor's death, either to bring an action of declarator of trust, with suitable conclusions, to meet the case; or, as is more usual and efficient, to apply to the Court of Session for the appointment of a judicial factor to carry out the purposes of the deceased executor's nomination.

Nicoll v. *Wilson.*—Executors who had expede a partial confirmation having died, other persons confirmed to the estate *quoad non executa*—Held that these last executors were bound to call all parties to account who might be indebted to the estate, and were not limited by the partial confirmation of the predecessors. (10th June 1856.) Case.

SECOND. *Quoad Omissa et Male Appretiata.*

From the injunction in the Act 4th Geo. IV. cap. 98, to expede confirmation of the whole estate, confirmations *ad omissa vel male appretiata* very seldom occur, except in the case of executors-creditors, where the creditor first in the field merely expedes avowedly a partial confirmation, or has been deficient in information with respect to the full particulars regarding the estate of the defunct debtor. When resorted to.

Norris v. *Law.*—A principal executor will get any subject omitted eiked to the testament preferably to a creditor seeking Cases.

Cases. to be confirmed *ad omissa*, if the executor can prove that it was not *dolose* omitted. (6th December 1738.)

Atkinson v. *Learmonth*.—Held by the Lord Ordinary, and, although not necessary to be decided, observed by the Court, that after the nearest in kin of a defunct has partially confirmed, a confirmation as executor-creditor *ad omissa* is the only valid diligence by which the remainder can be attached, seeing that the omitted funds remain *in bonis* of the defunct, and therefore an arrestment on a decree of constitution against the executor is, *quoad hoc*, inept. (14th January 1808.)

See also *Lee* v. *Donald* (17th May 1816), *ante*, page 100.

Effect in Scotland of English and Irish Probates and Letters of Administration.

CHAPTER XIV.

EFFECT IN SCOTLAND OF ENGLISH AND IRISH PROBATES AND LETTERS OF ADMINISTRATION.

Procedure to obtain effect.

BY way of reciprocating the privilege conferred by the Act of last Session, of including in a Scotch confirmation, personal estate, and effects in England and in Ireland belonging to persons who have died domiciled in Scotland, the Act, section 14, provides, that from and after the 12th November 1858, when any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon, signed by the proper officer, stated to have died domiciled in England, or by the Court of Probate in Ireland to the executor or administrators of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in the Commissary Court of the County of Edinburgh, and a copy thereof deposited with the commissary clerk of the said Court: the commissary clerk shall endorse or write on the back or face of such grant a certificate in the form as near as may be of the schedule F., annexed to the Act; and such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the same operation in Scotland as if a confirmation had been granted by the said Court.

Affidavit as to value.

The party applying for probate or letters of administration must, in addition to the usual affidavit with respect to the amount of the estate, &c., separately specify the value of the estate and effects in Scotland, § 15. Unfortunately, however, the Act does not require that such separate specification shall

be contained in the probate or letters of administration, and information that would be useful is thereby withheld from parties called upon to obtemper these writs.

Affidavit as to domicile.

The affidavit of the party applying for probate or letters of administration must further bear, "that the deceased was domi-"ciled in England or in Ireland," as the case may be, "accord-"ing to the deponent's belief, which shall be sufficient to autho-"rise the same to be so stated in or upon the probate or "letters of administration." Such statement is declared evidence, and to have effect for the purposes of the Act only. § 17.

Anomaly.

A great, and, it may be, a very inconvenient anomaly is created in the law of Scotland by probates and letters of administration, not preceded by any inventory of the estate, and merely mentioning the slump amount in the United Kingdom, being declared to have the like force and effect, and to have the same operation in Scotland, as if a confirmation had been granted by the Commissary Court of Edinburgh; while a testament-dative or testamentar by that Court must bear reference to a special inventory of the estate, and the executor is not entitled to intromit with any funds of the deceased except those detailed in the inventory.

What consequences this may produce, it is impossible to predict; but it is pretty clear that it will derange and give rise to questions with respect to the rights and preferences of executors-creditors.

CHAPTER XV.

STAMP AND LEGACY DUTIES.

THE new regulations in regard to stamp duties on probates and letters of administration in England and Ireland, and on inventories of personal estates in Scotland, are contained in sections 9, 15, and 16 of the recent Act,—to which reference is made. New regulations.

A saving of duty is generally effected in the case of a deceased person dying domiciled in any part of the United Kingdom, possessed of personal estate situated in more than one portion of it. Formerly, duty fell to be paid separately on the estate in England, on the estate in Ireland, and on the estate in Scotland. It is now competent to pay duty on the estate *in cumulo*.

It is not, however, made imperative by the act to pay duty on the whole estate, wheresoever situated, in the United Kingdom, unless in the case of English or Irish estate, the executor shall make affidavit that the deceased was domiciled in England or in Ireland, and in the case of Scotch estate, the Commissary shall find that the deceased was domiciled in Scotland. It is thus left competent for an executor to expede confirmation of the Scotch part of the estate in the Commissary Courts in Scotland, and to take out probate or letters of administration of those parts of the estate situated in England or in Ireland, in the courts of probate of these two parts of the United Kingdom respectively—all as was the former practice. Not imperative.

Where the deceased person died having his domicile in any part of the United Kingdom, although stamp duty is exigible on probates and letters of administration, or on inventories with reference to his personal estate in British colonies or in foreign

Liability for duty.

countries, no legacy or residue duty is chargeable thereon. Where, on the other hand, a person dies domiciled in a British colony, or in a foreign country, stamp duty has to be paid on the probates or letters of administration taken out by his executor in the Courts of Probate in England or in Ireland, and on the inventory exhibited and recorded in the Commissary Court at Edinburgh; but his estate is not liable in legacy or residue duty.

In the case of Thomson *v.* H.M. Advocate-general (18th February 1845), it was held by the House of Lords (reversing the judgment of the Court of Session), that legacy duty was not payable on money situated in Scotland bequeathed by a native and subject of England, who died domiciled in Demerara; and an opinion was given, that the liability of a testator's estate to legacy duty depends upon the testator's domicile at his death, whether the assets are locally situated and have been administered to in Great Britain or not.

Provisions by marriage-contract.

It has been decided that irrevocable provisions for fixed sums contained in a contract of marriage are not of a testamentary character; but that such provisions are to be reckoned as debts due by the father in settling the proper amount of inventory and residue duty. In the case of The Advocate-General *v.* Trotter (Scotch Exchequer, 14th January 1847), a husband having, by an antenuptial contract of marriage, provided £20,000 to the children of the marriage, payable at the first term of Whitsunday or Martinmas after his death, reserving power of division or apportionment by writing under his hand, and declaring it in full of bairns' part of gear, legitim, portion natural, executry, or anything else which they could claim through his decease—it was held that this provision was not liable to legacy duty. Of course the inventory must be impressed with a stamp corresponding to the full amount of the

estate, deduction of such provisions being allowed in the final settlement with the Inland Revenue.

A table of the duties payable on inventories and on legacies and residues will be found in the Appendix. The relative duties are the same in all parts of the United Kingdom. Table.

CHAPTER XVI.

JUDICIAL PROCEEDINGS.

THE judicial proceedings before Commissary Courts in Scotland are, by the Acts 16th and 17th Vict., cap. 80, entituled, "An "Act to facilitate Procedure in the Sheriff Courts in Scotland" (15th August 1853), assimilated to those before Sheriff Courts —section 21 enacting, that "the procedure in consistorial and "maritime causes shall be as nearly as may be the same as is "herein-before provided with reference to ordinary actions." Considerable latitude, however, is in practice given by the Commissary, both with respect to original applications and procedure, where a deviation from Sheriff Court forms appears better adapted to the particular case.

By the Act of 1858, § 18, the Court of Session are authorised and required, from time to time, to pass such Acts of Sederunt as shall be necessary and proper for regulating in all respects the proceedings under that Act before the Commissary of Edinburgh and other Commissaries in Scotland, and following out the purposes of the Act, and also the fees to be paid to agents before the said Courts, and to the commissary clerks and other officers of Court, and the expense of publication of petitions. In pursuance of this provision the Act of Sederunt of 19th March, which will be found in the Appendix, was passed.

CHAPTER XVII.

FEES.

A. S. 19th March 1859.

THE fees exigible by commissary clerks and practitioners before the Commissary Court, are regulated by an Act of Sederunt passed on 19th March 1859, which will be found in the Appendix.

It will be observed from the Table, that a higher fee is allowed to the commissary clerk for expeding a testament-testamentar than a testament-dative, in consequence of greater trouble and responsibility attaching to the issuing of the one than of the other, as explained in Chapter XI., p. 88.

Letters.

The committee of inferior commissary clerks proposed that a fee should be allowed them for Writing Letters, but this was negatived as liable to abuse, and contrary to the rule that the business of a court should be conducted by the personal attendance of parties or their agents.

Annual return by commissary clerks.

By the Act of Sederunt of 19th March it is enacted, that commissary clerks shall enter in a book to be kept by them for the purpose, an accurate account of the whole Fees and Emoluments received by them from the commencement of this Act, and shall, on the 1st of April in each year, or within ten days thereafter, transmit to the Queen's Remembrancer in Exchequer an abstract of the Fees and Emoluments received by them for the year immediately preceding, in order that the amount of such Fees and Emoluments may be known. A form of such an abstract will be found in the Appendix annexed to the Act of Sederunt.

CHAPTER XVIII.

MEANING OF WORDS.

THE late Act, § 20, is very brief on this point, merely declaring that "The word 'Commissary' shall include commissary depute, "and the term 'commissary clerk' shall include commissary "clerk depute," but it is necessary also to attend that the general Act, 13th Vict. cap. 21, respecting the construction, &c. of words in Acts, provides, § 4, that "in all Acts, words importing "the masculine gender shall be deemed and taken to include "females, and the singular to include the plural, and the plural "the singular, unless the contrary as to gender or number is "expressly provided; and the word month to mean calendar "month, unless words be added showing lunar month to be "intended; and 'county' shall be held to mean also county of "a town or of a city, unless such extended meaning is expressly "excluded by words; and the word 'land' shall include mes- "suages, tenements and hereditaments, houses and buildings, of "any tenure, unless where there are words to exclude houses "and buildings, or to restrict the meaning to tenements of some "particular tenure, and the words 'oath,' 'swear,' and 'affidavit,' "shall include affirmation, declaration, affirming, and declaring, "in the case of persons by law allowed to declare or affirm "instead of swearing."

APPENDIX.

No. I.

ACTS OF PARLIAMENT.

1.—ACT OF THE SCOTTISH PARLIAMENT 1695, CAP. XLI.

INTITULED

ACT anent Executry and Moveables.

OUR SOVERAIGN LORD Considering that the Law is defective, as to the affecting with legal diligence the moveable Estate which pertained to a Defunct, either for his own or his nearest of kins debt, in such manner as a Defuncts heretage may be affected by charging to enter heir in the known manner Doth therefore with advice & consent of the Estates of Parliament Statute and Ordain that in the case of a moveable Estate left by a Defunct, and falling to his nearest of kin, who lyes out, and doth not confirm the Creditors of the said nearest of kin, may either require the Procurator-fiscal to confirm and assign to them under the perril and pain of his being lyable for the debt, if he refuse, or they may obtain themselves Decerned Executors-Dative to the defunct as if they were Creditors to him: With this provision allwayes, that the creditors of the Defunct, doing diligence to affect the said moveable Estate within year and day of their debitor's deceas, shall alwayes be preferred to the diligence of the said nearest of kin. And it is further Declared that in the case of any depending cause or clame against a Defunct the time of his deceas it shall be leisom to

the persuer of the said Cause or Clame, to charge the Defuncts nearest of kin to confirm Executor to him within twenty dayes after the Charge given, which charge so execute shall be a passive title against the person charged as if he were a vitious Intrometter, unless he Renunce, and then the Charger may proceed to have his debt Constitut, and the hæreditas jacens of moveables declared lyable by a decreet cognitionis causa, upon the obtaining whereof, he may be Decerned Executor-Dative to the defunct and so affect his moveables in the common form.

Note.—In reference to this Act see Ersk., Book iii. tit ix. § 35.

2.—THE THELLUSSON ACT, 39TH AND 40TH GEORGE III. CAP. XCVIII.

INTITULED

An ACT to restrain all Trusts and Directions in Deeds or Wills, whereby the Profits or Produce of real or personal Estate shall be accumulated, and the beneficial Enjoyment thereof postponed beyond the Time therein limited.—[28th July 1800.]

WHEREAS it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained: May it therefore please your Majesty, that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, and by the authority of the same, that no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated; for any longer term than the life or lives of

any such grantor or grantors, settlor or settlors; or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator; or during the minority or respective minorities of any person or persons, who shall be living, or in *ventre sa mere*, at the time of the death of such grantor, devisor, or testator; or during the minority or respective minorities only of any person or persons, who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interests, dividends, or annual produce so directed to be accumulated: and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed. II.—Provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given, as if this Act had not passed. III.—Provided also, and be it enacted, That nothing in this Act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland. IV.—Provided also, and be it enacted, That the restrictions in this Act contained shall take effect and be in force with respect to wills and testaments made and executed before the passing of this Act, in such cases only where the devisor or testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this Act.

Note.—By the 41st section of the Act 11th and 12th Vict. cap. 36 (August 1848), the exception as to heritage in Scotland, in section 3 of the Thellusson Act, was repealed.

3.—ACT 4TH GEORGE IV. CAP. XCVII.

INTITULED

An ACT for the Regulation of the Court of the Commissaries of *Edinburgh*; and for altering and regulating the Jurisdiction of Inferior Commissaries in *Scotland*.—[19*th July* 1823.]

WHEREAS an Act was passed in the Forty-eighth Year of the Reign of His late Majesty King *George* the Third, intituled *An Act concerning the Administration of Justice in* Scotland, *and concerning Appeals to* 48 G. 3, c. 151. *the House of Lords;* by which Act His said late Majesty was empowered to name and appoint, and pursuant to which His said late Majesty did name and appoint, by His Majesty's Royal Sign Manual, certain Persons to make Inquiries into the Form of Process before the Court of Session and the Inferior Courts, and to report upon various Matters therein particularly set forth: And whereas an Act was passed in the Forty-ninth Year of the Reign of His said late Majesty, intituled 49 G. 3, c. 119. *An Act to give to the Persons named by His Majesty, pursuant to an Act passed in the last Session of Parliament, intituled* "*An Act* "*concerning the Administration of Justice in* Scotland, *and concerning* "*Appeals to the House of Lords,*" *further Time for making their Report or Reports:* And whereas the Commissioners so appointed did make Reports to His said late Majesty, and the Two Houses of Parliament, relative to the Subject Matter upon which they were directed to report: And whereas, by a Warrant under the Sign Manual of His Royal Highness The Prince Regent, acting in the Name and on Behalf of His said late Majesty, dated the Eighth Day of *February* One thousand eight hundred and fifteen, other Commissioners were appointed for inquiring into the Duties, Salaries, and Emoluments of the several Officers, Clerks, and Ministers of Justice of the Courts of *Scotland*, and for reporting what Regulations might be fit to establish respecting the same; which Commissioners have accordingly made several Reports, which have been laid before Parliament, and in which it is recommended that Provision should be established with respect to the granting Confirmations, which may prevent the just Rights of next of Kin and of Creditors from being defeated; that Quots or Compo-

sitions should be abolished; and that certain Regulations with respect to Fees and otherwise, should be made, in regard to the Court of the Commissaries of *Edinburgh*, and with respect to the Jurisdiction of inferior Commissary Courts: Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the First Day of *January* One thousand eight hundred and twenty-four, all Compositions in respect of Confirmation, and all Fees termed Consignation Fee and Sentence Money, shall be and the same are hereby from thenceforth abolished.

Compositions in respect of Confirmation, and Fees termed Consignation Fee and Sentence Money, abolished.

II. And be it further enacted, That from and after the First Day of *January* One thousand eight hundred and twenty-four, Extracts of Decrees in the said Court of the Commissaries of *Edinburgh*, and Testaments Testamentor in the Manner now practised, shall cease and determine; and thereafter abridged Forms of Extracts, in the Manner hereinafter provided, shall be adopted; save and except where a full Extract shall be required in the Manner now practised by any Party desiring the same.

Extracts of Decrees, as now practised, to cease.

III. And be it further enacted, That as soon as conveniently may be after the passing of this Act, the Judges of the said Court of the Commissaries of *Edinburgh* shall, and they are hereby directed and required to frame a proper and suitable Table of Fees, to be taken by the Clerks and Officers of the said Court, and the Practitioners before the same, for and in respect of Proceedings in such Court, in order to fix and ascertain the Emoluments and Charges which shall be justly exigible by such Clerks, Officers, and Practitioners; and also proper and suitable Forms for abridging the Forms of Extracts now in use in the said Court, as nearly as may be according to the Forms for Extracts prescribed by an Act passed in the Fiftieth Year of the Reign of His late Majesty King *George* the Third, intituled, *An Act for abridging the Form of extracting Decrees of the Court of Session in* Scotland, *and for the Regulation of certain Parts of the Proceedings of that Court;* and also to fix and ascertain the Fees to be paid for such Extracts to be included in the said Table of Fees, having regard to the Reports of the said Commissioners in that Behalf.

Commissaries of Edinburgh to prepare Table of Fees, and to frame Forms for abridging of Extracts.

50 G. 3, c. 112.

Such Form and Table of Fees to be sanctioned by the Court of Session.

IV. Provided always, and be it enacted, That every such Form and Table of Fees, to be framed by the Judges of the said Court, pursuant to this Act, shall be presented by such Judges to the Lords of Council and Session, by whom the same shall be considered; and after due Deliberation and Conference, if necessary, with the said Judges, every such Form and Table of Fees shall, with or without Alteration, be adjusted and published by an Act of Sederunt of the Court of Session; and it shall be lawful for the said Lords to alter any such Form and Table of Fees by a new Act or Acts of Sederunt, from Time to Time thereafter, as they shall see Cause: Provided always, that every such Act of Sederunt shall be reported to Parliament in manner hereinafter directed.

Office of Principal Clerk to be abolished.

V. And be it further enacted, That from and after the First Day of *January* One thousand eight hundred and twenty-four, the Office of Principal Clerk of the said Court of the Commissaries of *Edinburgh* shall be, and the same is hereby from thenceforth abolished, and thenafter there shall only be Two Clerks of the said Court entitled to receive Fees; the one to be appointed by His Majesty, and who shall perform the Duties of his Office in Person; the other to be named by the Clerk so appointed, as his Deputy during his Pleasure, and for whom he shall be responsible.

Commissaries Clerks to discharge Duties in Person.

Sheriffdoms and Stewartries to become Commissariats.

VI. And be it further enacted, That from and after the said First Day of *January* One thousand eight hundred and twenty-four, the Boundaries of all inferior Commissariats, as they exist at present, shall cease and determine; and from thenceforth every Sheriffdom and Stewartry shall constitute a Commissariat, excepting always the Sheriffdoms of *Edinburgh*, *Haddington*, and *Linlithgow*, which Sheriffdoms shall be and remain the Commissariat of *Edinburgh*, as provided by this Act; and provided always, that where Two Counties shall be under the jurisdiction of one Sheriff, such Two Counties shall constitute One Commissariat.

Small Debt Jurisdiction of Commissaries abolished.

VII. And be it further enacted, That from and after the said First Day of *January* One thousand eight hundred and twenty-four, the Jurisdiction now exercised by the Commissaries of *Edinburgh*, in Actions for the Recovery of Debts not exceeding Forty Pounds *Scots*, and all Prorogation of their Jurisdiction in any action for the Recovery

of Debt, shall be and the same is hereby declared to be from thenceforth abolished and prohibited; and no inferior Commissary, as established by this Act, shall possess or exercise any Jurisdiction in such Actions, or in any Cases to which the Jurisdiction of the Sheriff is now competent.

Inferior Commissaries as at present to cease, and Sheriffs to become Commissaries.

VIII. And be it further enacted, that from and after the said First Day of *January* One thousand eight hundred and twenty-four, the Persons then severally filling the Offices of inferior Commissaries shall cease to hold such Offices; and the Persons then filling the Offices of Sheriffs or Stewarts Depute shall respectively become Commissaries, each over the Commissariat comprehending the County or Stewartry or Counties of which such Persons shall respectively be Sheriffs or Stewarts Depute; and every such Person shall continue to hold the said Office of Commissary so long as he shall fill the said Office of Sheriff or Stewart Depute of such County or Stewartry, or Counties, and no longer; and every Person thereafter appointed to the Office of Sheriff or Stewart Depute shall, in consequence of such Appointment, become the Commissary of the Commissariat hereby established, over the County or Stewartry or Counties of which he is appointed the Sheriff or Stewart Depute, and be vested with all the Jurisdiction, Powers, and Privileges belonging to the said Office of Commissary therein, and shall continue to hold and exercise the same so long as he shall fill the said Office of Sheriff or Stewart Depute, and no longer.

Proceedings of Sheriffs or Stewarts, as Commissaries, reviewable only by the Court of Session.

IX. And be it further enacted, That it shall not be lawful or competent for the Judges of the said Court of the Commissaries of *Edinburgh* to review the Proceedings of inferior Commissaries as established by this Act, but all such Proceedings shall be reviewable only by the Court of Session.

Sheriff Substitutes to be appointed Commissaries Depute.

X. And be it further enacted, That it shall and may be lawful for every Sheriff or Stewart Depute hereby appointed a Commissary, and his Successor in Office within his Sheriffdom or Stewartry, to name and appoint as his Deputy or Deputies the Person or Persons acting as Sheriff Substitute or Substitutes within such County, so long as any such Person or Persons shall continue so to act; and every such Commissary and Commissary Depute shall exercise within their several Commissariats, as hereby constituted, the Powers and Authorities

exercised by the present Commissaries; save and except as is provided by this Act.

Provision as to depending Actions.

XI. And be it further enacted, That all Actions and Proceedings which shall be depending on the said First Day of *January* One thousand eight hundred and twenty-four, before any inferior Commissary, shall by virtue of this Act be transferred to the Commissary of the County or Stewartry wherein such Actions and Proceedings would have originated if this Act had been passed previous to the Commencement thereof; and such Actions and Proceedings shall thereupon be pursued and brought to a Conclusion before such Commissary, in the same Manner as if they had been brought or commenced before such Commissary in the first Instance; and as soon as conveniently may be after the said First Day of *January* One thousand eight hundred and twenty-four, the Processes in all such depending Actions and all such depending Proceedings shall be accordingly transmitted, together with an Inventory thereof made by the Commissary Clerk, to the Accuracy of which he shall make Oath, if required.

Records and Warrants of Decrees of inferior Commissaries to be transmitted to the General Register House.

XII. And be it further enacted, that as soon as conveniently may be after the said First Day of *January* One thousand eight hundred and twenty-four, all other Processes, Records, and Warrants of Decrees of inferior Commissaries, together with an inventory thereof made by the Commissary Clerk, which he is hereby required to do, and to make Oath to the Accuracy thereof, if required, shall be transmitted to the General Register House at *Edinburgh*.

Where Courts are at present held, the Clerk shall become the Commissary Clerk for the Commissariat hereby established, who may name his Deputy, &c.

XIII. And be it further enacted, That in Counties or Stewartries wherein a Commissary Court is at present held, the Clerk of such Court shall, after the said First Day of *January* One thousand eight hundred and twenty-four, become the Commissary Clerk for the Commissariat hereby established in such County or Stewartry, with Power to such Commissary Clerk to name a Deputy to act for him so long as he shall hold the said Office, and for whom he shall be responsible; and in any County or Stewartry where more than one of such Courts is at present held, the Commissary Clerk whose Emoluments shall amount to the highest annual Sum, as set forth in the Report of the said Commissioners in that Behalf, hereinbefore recited, shall become

the Commissary Clerk for the Commissariat hereby established in such County or Stewartry, with Power to name a Deputy as aforesaid.

Provision as to other Commissary Clerks.

XIV. And be it further enacted, That in all other Counties, as also in the Event of the Death, Resignation, or Removal of any such Commissary Clerk, who shall become the Commissary Clerk of a Commissariat, as immediately before directed, it shall and may be lawful for His Majesty, his Heirs and Successors, to appoint a proper Person to be Commissary Clerk; and every Person henceforth to be appointed a Commissary Clerk shall perform his Duty in Person.

No Gratuity for any Appointment.

XV. And be it further enacted, That all Appointments and Nominations to any Office in any of the said Commissary Courts shall be made without receiving any Price, Gratuity, or valuable Consideration of any Kind.

Judges of the Court of Session to appoint Commissioners to frame Regulations and a Table of Fees for Commissary Courts.

XVI. And be it further enacted, That as soon as conveniently may be after the passing of this Act, the Court of Session, at a Meeting specially called by the Lord President for this Purpose, shall and they are hereby directed and required to appoint, by a Commission duly executed by them, Five Sheriffs or Stewarts Depute, for the Purpose of establishing Tables of Fees in the several inferior Commissary Courts as hereby established, in the Manner directed in the Case of the Court of the Commissaries of *Edinburgh*, regard being always had to the Reports of the said Commissioners hereinbefore recited in that Behalf.

Provision as to abridged Extracts.

XVII. And be it further enacted, That the said Five Sheriffs or Stewarts so appointed shall and they are hereby authorized and required to frame proper and suitable Forms for abridging the Extracts of the Decrees of the said inferior Commissary Courts, as established by this Act, as nearly as may be according to the Forms for Extracts prescribed by the said Act passed in the Fiftieth Year of the Reign of His late Majesty King *George* the Third, intituled *An Act for Abridging the Form of extracting Decrees of the Court of Session* in Scotland, *and for the Regulation of certain Parts of the Proceedings of that Court.*

50 G. 3. c. 112.

Form to be established by Act of Sederunt.

XVIII. And be it further enacted, That a Report or Reports shall be made to the Court of Session by the said Five Sheriffs or Stewarts

so appointed, as to the several Matters and Things upon which they are directed to report as aforesaid; and after such Reports shall have been so made, it shall and may be lawful for the said Court, if they think fit, to require Explanations or Information relative to any Part of such Report or Reports, and to have Conferences thereupon with all or any of the said Sheriffs and Stewarts so appointed; and after being well and ripely advised in that Behalf, it shall and may be lawful for the Court of Session to give effect to the same by any Act or Acts of Sederunt, to be observed in each of the said Commissary Courts established by this Act, and the several Persons holding Offices and discharging Duties therein, or practising before the same.

A Copy of every Act of Sederunt made under this Act to be laid before Parliament.

XIX. Provided always, and be it enacted, That a Copy of every such Act of Sederunt, and Table of Fees to which it may or shall refer, shall be transmitted by the Lord President of the Court of Session to His Majesty's Secretary of State for the Home Department, who shall cause a Copy thereof to be laid before each House of Parliament, at or immediately after the Commencement of the Session of Parliament next ensuing the passing of this Act; and every Fee sanctioned by such Act of Sederunt, shall and may be demanded and taken from and after the said First Day of *January* One thousand eight hundred and twenty-four, and shall thereafter, according to the Terms of such Act of Sederunt, be and be deemed and taken to be a legal Fee, and payable and receivable as such in the Manner therein directed, unless altered by Parliament.

Further Power to establish Fees.

XX. And be it further enacted, That from Time to Time and in all Time hereafter, as often as it shall appear to be necessary, it shall and may be lawful for the Court of Session, at a Meeting to be called by the Lord President for that Purpose, to appoint, by a Commission duly executed by them, Five Sheriffs Depute, for the Purpose of considering any such Table of Fees theretofore established, in or for the inferior Commissary Courts hereby established, by which Five Sheriffs so to be from Time to Time appointed a Report or Reports shall be made to the Court of Session as hereinbefore directed; and after any such Report shall have been made, it shall and may be lawful for the said Court, if they think fit, to require Explanations or Information relative thereto as aforesaid, and to have Conferences thereupon with

all or any of the said Sheriffs; and by Act or Acts of Sederunt to make and establish a further or other Table or Tables of Fees in and for the said inferior Commissary Courts, and the Officers and Practitioners therein: Provided always, that no Claim or Compensation shall arise or be allowed to any Clerk or Officer appointed after the passing of this Act, by reason of any such further Table of Fees; and provided also, that a Copy of every such Act of Sederunt, together with any Table of Fees to which it may refer, shall be transmitted by the Lord President of the Court of Session to His Majesty's Secretary of State for the Home Department, who shall cause a Copy thereof to be laid before each House of Parliament as hereinbefore directed; and after the expiration of the Period hereinbefore limited, as the Case may be, every such Act of Sederunt and Table of Fees shall become in force; and thereafter, but not sooner, every such Fee shall, according to the Terms of such Act of Sederunt, be and be deemed and taken to be a legal Fee, and payable and receivable as such in the Manner therein directed.

Compensation to be made to Commissaries, &c.

XXI. And be it further enacted, That it shall and may be lawful for any Commissary, Commissary Clerk, or other Officer holding his Office at the passing of this Act, and entitled to Compensation for Loss to be suffered through the Operation and Effect of this Act, to make Application to the Barons of Exchequer in *Scotland*, who shall direct Intimation thereof to be given to His Majesty's Advocate, and thereafter the said Barons shall enquire into and consider the Circumstances of the Case, and after due Investigation of the Legality of the Claim, and of the Fees or Emoluments in respect whereof such Loss shall be stated to have arisen, and having regard to the Fees to which any such Person may become entitled pursuant to this Act, the said Barons shall award to every such Person such Compensation as they shall think such Person entitled to, either by the Payment of a gross Sum or by way of Annuity, as they shall think proper: Provided always, that every Order made for such Compensation shall be laid before Parliament within Two Calendar Months after the Commencement of the Session next ensuing after making the same: Provided further, that no Decision of the said Barons shall be final and conclusive, until Two Calendar Months after a Copy of the Order of such Barons for Compensation shall have been laid before Parliament.

Fund out of which Compensation shall be paid.

XXII. And be it further enacted, That any Sum of Compensation so to be awarded shall be paid and payable upon the Order of the said Barons, in such Manner and at such Time or Times as they shall direct, out of any Monies charged or made chargeable by Acts made in the Seventh and Tenth Years of the Reign of Her Majesty *Queen Anne*, with the Fees, Salaries, and other Charges allowed or to be allowed for keeping up the Courts of Session, Justiciary, or Exchequer; and every Sum of Compensation to be paid shall be free and clear of all Taxes and Deductions whatsoever.

Salaries of Sheriffs to be paid without Deduction.

XXIII. And be it further enacted, That the respective Salaries of Sheriffs and Stewarts Depute and Substitute shall, after the passing of this Act, be paid to them free of all Taxes and Deductions whatsoever; any Law or Practice to the contrary notwithstanding.

4.—ACT 4TH GEORGE IV. CAP. XCVIII.

INTITULED

An ACT for the better granting of Confirmations in Scotland. [19th July 1823.]

WHEREAS it is expedient that provision should be made for the better granting of Confirmations, in certain cases, in Scotland; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act, in all cases of Intestate Succession, where any person or persons who, at the period of the death of the Intestate, being next of kin, shall die before Confirmation be expede, the right of such next of kin shall transmit to his or her representatives, so that Confirmation may and shall be granted to such representatives, in the same manner as Confirmations might have been granted to such next of kin immediately upon the death of such intestate.

Right to Confirmation to transmit to representatives.

Court to regulate Caution to be found.

II. And be it further enacted, That from and after the first day of January one thousand eight hundred and twenty-four, Caution shall not be required to be found by Executors Nominate; and in all other cases the Court granting Confirmation shall fix the amount of the sum for which Caution shall be found by the person or persons to whom Confirmation shall be granted, not exceeding the amount confirmed.

Partial Confirmations to cease.

III. And be it further enacted, That from and after the first day of January one thousand eight hundred and twenty-four, every person requiring Confirmation shall confirm the whole moveable estate of a deceased person known at the time, to which such person shall make oath: Provided always, that it shall and may be lawful to eik to such Confirmation any part of such estate that may afterwards be discovered, provided the whole of such estate so discovered, shall be added, upon oath as aforesaid: Provided nevertheless, that nothing herein contained shall affect or alter the provision made with respect to special Assignations by an Act of the Scottish Parliament, made in the year one thousand six hundred and ninety, intituled *Act anent the Confirmation of Testaments.*

In cases of Executor's Creditor, Confirmation to be granted.

IV. Provided further, and be it enacted, That in the case of Confirmation by Executor's Creditor, such Confirmation may be limited to the amount of the debt and sum confirmed to which such creditor shall make oath: Provided always, that notice of every application for Confirmation by any Executor's Creditor shall be inserted in the Edinburgh Gazette, at least once, immediately after such application shall be made; in evidence whereof, a copy of the Gazette in which such notice shall have been inserted shall be produced in Court before any such Confirmation shall be further proceeded in.

5.—ACT 18TH VICTORIA CAP. XXIII.

INTITULED

An ACT to alter in certain respects the Law of Intestate Moveable Succession in Scotland.—[25th May 1855.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:—

The Issue of a predeceasing Next of Kin shall come in the Place of their Parent in the Succession to an Intestate.

I. In all Cases of Intestate Moveable Succession in *Scotland* accruing after the passing of this Act, where any Person who, had he survived the Intestate, would have been among his Next of Kin, shall have predeceased such Intestate, the lawful Child or Children of such Person so predeceasing shall come in the Place of such Person, and the Issue of any such Child or Children, or of any descendant of such Child or Children, who may in like Manner have predeceased the Intestate, shall come in the Place of his or their Parent predeceasing, and shall respectively have Right to the Share of the Moveable Estate of the Intestate to which the Parent of such Child or Children or of such Issue, if he had survived the Intestate, would have been entitled: Provided always, that no Representation shall be admitted among Collaterals after Brothers and Sisters Descendants, and that the surviving Next of Kin of the Intestate claiming the Office of Executor shall have exclusive Right thereto, in preference to the Children or other Descendants of any predeceasing Next of Kin, but that such Children or Descendants shall be entitled to Confirmation when no Next of Kin shall compete for said Office.

Issue of predeceasing Heir succeeding to the Intestate's Heritage may collate, but other Issue not exclud-

II. Where the Person predeceasing would have been the Heir in Heritage of an Intestate leaving Heritable as well as Moveable Estate had he survived such Intestate, his Child, being the Heir in Heritage of such Intestate, shall be entitled to collate the Heritage to the effect of claiming for himself alone, if there be no other Issue of the Predeceaser, or for himself and the other Issue of the Predeceaser, if there be such other Issue, the Share of the Moveable Estate of the Intestate

which might have been claimed by the Predeceaser upon Collation if he had survived the Intestate; and Daughters of the Predeceaser, being Heirs Portioners of the Intestate, shall be entitled to collate to the like effect; and where, in the Case aforesaid, the Heir shall not collate, his Brothers and Sisters, and their Descendants in their Place, shall have Right to a Share of the Moveable Estate equal in Amount to the Excess in Value over the Value of the Heritage of such Share of the whole Estate, Heritable and Moveable, as their predeceasing Parent had he survived the Intestate would have taken on Collation.

ed by his not collating from claiming out of Moveable Estate Difference between Value of Heritage and Share their Parent would have taken on Collation.

III. Where any Person dying intestate shall predecease his Father without leaving Issue, his Father shall have a Right to One Half of his Moveable Estate, in preference to any Brothers or Sisters or their Descendants who may have survived such Intestate.

Father to succeed to Extent of One Half when no Issue.

IV. Where an Intestate dying without leaving Issue, whose Father has predeceased him shall be survived by his Mother, she shall have Right to One Third of his Moveable Estate, in preference to his Brothers and Sisters or their Descendants, or other Next of Kin of such Intestate.

Where Father has predeceased, Mother to succeed to Extent of One Third.

V. Where an Intestate dying without leaving Issue, whose Father and Mother have both predeceased him, shall not leave any Brother or Sister german or consanguinean, nor any Descendant of a Brother or Sister german or consanguinean, but shall leave Brothers and Sisters uterine, or a Brother or Sister uterine, or any Descendant of a Brother or Sister uterine, such Brothers and Sisters uterine and such Descendants in place of their predeceasing Parent shall have Right to One Half of his Moveable Estate.

Succession by Brothers and Sisters uterine.

VI. Where a Wife shall predecease her Husband, the Next of Kin, Executors, or other Representatives of such Wife, whether testate or intestate, shall have no Right to any Share of the Goods in Communion, nor shall any Legacy or Bequest or Testamentary Disposition thereof by such Wife affect or attach to the said Goods or any Portion thereof.

On a Wife predeceasing her Husband her Representatives to have no Claim on the Goods in Communion.

VII. Where a Marriage shall be dissolved before the Lapse of a Year and Day from its Date, by the Death of One of the Spouses,

Not to affect Rights of

Spouses on Dissolution of Marriage in certain Cases.

the whole Rights of the Survivor and of the Representatives of the Predeceaser shall be the same as if the Marriage had subsisted for the Period aforesaid.

Part of Act of Parliament of Scotland, 1617, c. 14. repealed.

VIII. So much of an Act of the Parliament of *Scotland* passed in the Year One Thousand six hundred and seventeen, and intituled *Anent Executors*, as allows Executors nominate to retain to their own Use a Third of the Dead's Part in accounting for the Moveable Estate of the Deceased, is hereby repealed, and Executors nominate shall, as such, have no Right to any Part of the said Estate.

Interpretation of Terms.

IX. The Words "Intestate Succession" shall mean and include Succession in Cases of partial as well as of total Intestacy; "Intestate" shall mean and include every Person deceased who has left undisposed of by Will the whole or any Portion of the Moveable Estate on which he might, if not subject to Incapacity, have tested; "Moveable Estate" shall mean and include the whole free Moveable Estate on which the Deceased, if not subject to Incapacity, might have tested, undisposed of by Will, and any Portion thereof so undisposed of.

6.—ACT 21st AND 22d VICTORIA, CAP. LVI.

INTITULED

An ACT to amend the Law relating to the Confirmation of Executors in *Scotland*, and to extend over all Parts of the United Kingdom the Effect of such Confirmation, and of Grants of Probate and Administration.—[23d July 1858.]

WHEREAS it is expedient to amend the Law relating to the Confirmation of Executors in *Scotland*, and to extend over the United Kingdom the Effect of such Confirmation, and of Grants of Probate and Administration: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal,

and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:—

Practice of raising Edicts of Executry to cease.

I. From and after the Twelfth Day of *November* One Thousand eight hundred and fifty-eight, the Practice of raising Edicts of Executry before the Commissary Courts in *Scotland*, for the Decerniture of Executors to deceased Persons, shall cease, and it shall not be competent to any Person to obtain himself decerned Executor in virtue of any such Edict raised subsequently to the Date aforesaid.

Petition to Commissary to be substituted.

II. From and after the Date aforesaid, every Person desirous of being decerned Executor of a deceased Person as Disponee, Next of Kin, Creditor, or in any other Character whatsoever now competent, or of having some other Person, possessed of such Character, decerned Executor to a deceased Person, shall, instead of applying, as heretofore, for an Edict of Executry from the Commissary, present a Petition to the Commissary for the appointment of an Executor, which Petition shall be in the Form as nearly as may be of the Schedule (A) hereunto annexed, and shall be subscribed by the Petitioner or by his Agent.

Form of Petition as in Schedule (A).

To whom Petition to be presented.

III. Such Petition shall be presented to the Commissary of the County wherein the Deceased died domiciled, and in the Case of Persons dying domiciled furth of *Scotland*, or without any fixed or known Domicile, having Personal or Moveable Property in *Scotland*, to the Commissary of *Edinburgh*.

Mode of intimating Petition.

IV. Every such Petition, in place of being published at the Kirk-door and Market Cross, as Edicts of Executry have been in use to be published, shall be intimated by the Commissary Clerk affixing on the Door of the Commissary Court House, or in some conspicuous Place of the Court and of the Office of the Commissary Clerk, in such Manner as the Commissary may direct, a full Copy of the Petition, and by the Keeper of the Record of Edictal Citations at *Edinburgh* inserting in a Book, to be kept by him for that Purpose, the Names and Designations of the Petitioner and of the deceased Person, the Place and Date of his Death, and the Character in which the Petitioner seeks to be decerned Executor, which Particulars the Keeper of the Record of Edictal Citations shall cause to be printed and pub-

lished weekly, along with the Abstracts of the Petitions for General and Special Services, in the Form of Schedule (B) hereunto annexed; Provided always, that to enable the Keeper of the Record of Edictal Citations to make such Publication, the Commissary Clerk shall transmit to him the said Particulars, and to enable the Commissary Clerk to grant the Certificate after mentioned, the Keeper of the Record of Edictal Citations shall transmit to the Commissary Clerk a Copy, certified by the said Keeper, of the printed and published Particulars, all in such Form and Manner and on Payment of such Fees as the Court of Session by Act of Sederunt may direct.

Certificate of Intimation of Petition.

V. The Commissary Clerk, after receiving the certified Copy of the printed and published Particulars, shall forthwith certify on the Petition that the same has been intimated and published, in Terms of the Provisions of this Act, in the Form of Schedule (C) hereunto annexed, and such Certificate shall be sufficient Evidence of the Facts therein set forth: Provided always, that where a Second Petition for Confirmation is presented in reference to the same Personal Estate, the Commissary shall direct Intimation of such Petition to be made to the Party who presented the First Petition.

Additional Intimation of Petition in certain Cases.

Procedure on Petition.

VI. On the Expiration of Nine Days after the Commissary Clerk shall have certified the Intimation and Publication of a Petition for the Appointment of an Executor as aforesaid, the same may be called in Court, and an Executor decerned, or other Procedure may take place according to the Forms now in use in case of Edicts of Executry, and with the like Force and Effect; and Decree Dative may be extracted on the Expiration of Three lawful Days after it has been pronounced, but not sooner: Provided always, that nothing herein contained shall alter or affect the Law as to Executors finding Caution; and that Bonds of Caution for Executors may be partly printed and partly written.

Decree Dative.

Proviso as to Caution.

Not to affect present Procedure.

VII. Provided always, That nothing herein-before contained shall alter or affect the Course of Procedure now in use before the Commissaries in Confirmations of Executors Nominate.

Where Inventories, &c., may be recorded.

VIII. Inventories of Personal Estates of deceased Persons and relative Testamentary Writings may be given up and recorded in, and

Confirmations may be granted and issued by, any Commissary Court to which it is competent to apply in virtue of the Provisions of this Act for the Appointment of an Executor Dative to the Deceased. Confirmations may be granted.

IX. From and after the Date aforesaid it shall be competent to include in the Inventory of the Personal Estate and Effects of any Person who shall have died domiciled in *Scotland* any Personal Estate or Effects of the Deceased situated in *England* or in *Ireland*, or both: Provided that the Person applying for Confirmation shall satisfy the Commissary, and that the Commissary shall by his Interlocutor find that the Deceased died domiciled in *Scotland*, which Interlocutor shall be conclusive Evidence of the Fact of Domicile: Provided also, that the Value of such Personal Estate and Effects situated in *England* or *Ireland* respectively shall be separately stated in such Inventory, and such Inventory shall be impressed with a Stamp corresponding to the entire Value of the Estate and Effects included therein, wheresoever situated within the United Kingdom. Inventory may include Personal Estate in any Part of United Kingdom.

X. Confirmations shall be in the Form, or as nearly as may be in the Form, of Schedules (D) and (E) hereunto annexed; and such Confirmations shall have the same Force and Effect with the like Writs framed in Terms of the Acts of Sederunt passed on the Twentieth *December* One thousand eight hundred and twenty-three and the Twenty-fifth *February* One thousand eight hundred and twenty-four, or at present in use. Form and Effect of Confirmations.

XI. Oaths and Affirmations on Inventories of Personal Estates given up to be recorded in any Commissary Court may be taken either before the Commissary or his Depute, or the Commissary Clerk or his Depute, or before any Commissioner appointed by the Commissary, or before any Magistrate or Justice of the Peace within the United Kingdom or the Colonies, or any *British* Consul. Oaths before whom to be taken.

XII. From and after the Date aforesaid, when any Confirmation of the Executor of a Person who shall in manner aforesaid be found to have died domiciled in *Scotland*, which includes, besides the Personal Estate situated in *Scotland*, also Personal Estate situated in *England*, shall be produced in the Principal Court of Probate in *England*, and a Copy thereof deposited with the Registrar, together Confirmation produced in Probate Court of England, and sealed, to have the Effect of

Probate or Administration.

with a certified Copy of the Interlocutor of the Commissary finding that such deceased Person died domiciled in *Scotland*, such Confirmation shall be sealed with the Seal of the said Court, and returned to the Person producing the same, and shall thereafter have the like Force and Effect in *England* as if a Probate or Letters of Administration, as the Case may be, had been granted by the said Court of Probate.

Confirmation produced in Probate Court of Dublin, and sealed, to have the Effect of Probate or Administration.

XIII. From and after the Date aforesaid, where any Confirmation of the Executor of a Person who shall so be found to have died domiciled in *Scotland*, which includes, besides the Personal Estate situated in *Scotland*, also Personal Estate situated in *Ireland*, shall be produced in the Court of Probate in *Dublin*, and a Copy thereof deposited with the Registrar, together with a certified Copy of the Interlocutor of the Commissary finding that such deceased Person died domiciled in *Scotland*, such Confirmation shall be sealed with the Seal of the said Court, and returned to the Person producing the same, and shall thereafter have the like Force and Effect in *Ireland* as if a Probate or Letters of Administration, as the Case may be, had been granted by the said Court of Probate in *Dublin*.

Probate or Letters of Administration produced in Commissary Court and certified, to have Effect of Confirmation.

XIV. From and after the Date aforesaid, when any Probate or Letters of Administration to be granted by the Court of Probate in *England* to the Executor or Administrator of a Person who shall be therein, or by any Note or Memorandum written thereon signed by the proper Officer, stated to have died domiciled in *England*, or by the Court of Probate in *Ireland* to the Executor or Administrator of a Person who shall in like Manner be stated to have died domiciled in *Ireland*, shall be produced in the Commissary Court of the County of *Edinburgh*, and a Copy thereof deposited with the Commissary Clerk of the said Court; the Commissary Clerk shall endorse or write on the Back or Face of such Grant a Certificate in the Form as near as may be of the Schedule (F) hereunto annexed; and such Probate or Letters of Administration, being duly stamped, shall be of the like Force and Effect and have the same Operation in *Scotland* as if a Confirmation had been granted by the said Court.

For securing the Stamp

XV. In any of the aforesaid Cases where the deceased Person shall be stated in or upon the Probate or Letters of Administration to

have been domiciled in *England* or in *Ireland*, as the Case may be, such Probate or Letters of Administration shall, for the Purpose of securing the Payment of the full and proper Stamp Duties, be deemed and considered to be granted for and in respect of the whole of the Personal and Moveable Estate and Effects of the Deceased in the United Kingdom, within the Meaning of the Act of Parliament passed in the Fifty-fifth Year of the Reign of King *George* the Third, Chapter One hundred and eighty-four, and of all other Acts of Parliament granting or relating to Stamp Duties on Probates and Letters of Administration in *England* or *Ireland* respectively; and the Affidavit required by Law to be made on applying for Probate or Letters of Administration in *England* or *Ireland* as to the Value of the Estate and Effects of the Deceased; and also where the Commissary shall in manner aforesaid find that the Deceased was domiciled in *Scotland*, the Inventory required by Law to be exhibited and recorded in the proper Commissary Court in *Scotland* before obtaining Confirmation, or intermitting with or entering upon the Possession or Management of the Personal or Moveable Estate or Effects of the Deceased in *Scotland*, shall respectively extend to and include the whole of Personal and Moveable Estate of the deceased Person in the United Kingdom, and the Value thereof; and the Stamp Duties for the Time being chargeable on Probates and Letters of Administration and on Inventories respectively shall be chargeable upon any Probate or Letters of Administration to be granted, and any Inventory to be exhibited and recorded as aforesaid respectively, for and in respect of the whole of the Personal and Moveable Estate and Effects of the Deceased in the United Kingdom and the Value thereof; and the said Affidavit shall also separately specify the Value of the said Estate and Effects in *Scotland*.

Duties, Probates, &c., to be deemed granted for all the Property in the United Kingdom.

Inventory to include all such Property.

XVI. For the Purpose aforesaid, and also for granting Relief where too high a Stamp duty shall have been paid on any such Probate or Letters of Administration, or Inventory, the Provisions contained in Sections Forty, Forty-one, Forty-two, and Forty-three, of the said Act passed in the Fifty-fifth Year of His Majesty King *George* the Third, relating to Probates and Letters of Administration granted in *England*, and the like Provisions in the Act passed in the Fifty-sixth Year of the said King, Chapter Fifty-six, relating to Probates and Letters of Administration granted in *Ireland*, and the Pro-

Provisions of former Acts to apply to the Probates, Letters of Administration, and Inventories mentioned in this Act.

visions contained in the Act passed in the Forty-eighth Year of the said King, Chapter One hundred and forty-nine, relating to Inventories in *Scotland*, and also all other Provisions contained in the said Acts respectively, or in any other Act or Acts relating to Probates and Letters of Administration and Inventories respectively, shall apply to the Probates and Letters of Administration to which Effect is given by this Act, and to the whole of the Personal and Moveable Estate of the Deceased for or in respect of which the same shall, in pursuance of this Act, be deemed to be granted, wheresoever situate in the United Kingdom; and also to the Inventories in which the whole of the Personal and Moveable Estate of the Deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample a Manner as if all such Provisions were herein enacted in reference to such Probates, Letters of Administration, and Inventories respectively.

Affidavit as to Domicile to be made on applying for Probate or Administration.

XVII. Provided, That in any Case where, on applying for Probate or Letters of Administration, it shall be required to be stated as aforesaid that the Deceased was domiciled in *England* or in *Ireland*, the Affidavit so as aforesaid required by Law shall specify the Fact according to the Deponent's Belief, which shall be sufficient to authorise the same to be so stated in or upon the Probate or Letters of Administration; Provided also, that any such Statement, and the Interlocutor of the Commissary finding that the Deceased was domiciled in *Scotland*, shall be Evidence, and have effect for the Purposes of this Act only.

Acts of Sederunt to be passed for following out Purposes of this Act.

XVIII. It shall be competent to the Court of Session, and they are hereby authorized and required, from Time to Time, to pass such Acts of Sederunt as shall be necessary and proper for regulating in all respects the Proceedings under this Act before the Commissary of *Edinburgh* and other Commissaries in *Scotland*, and following out the Purposes of this Act, and also the Fees to be paid to Agents before the said Courts, and to the Commissary Clerks and other Officers of Court, and the Expense of Publication of Petitions.

Former Acts of Sederunt repealed if

XIX. All former Acts, and Acts of Sederunt made in virtue thereof, so far as inconsistent with the present Act, are hereby repealed; and this Act may be amended or repealed by any Act to be

passed during the present Session of Parliament, and may be cited as the "Confirmation and Probate Act, 1858." inconsistent with this Act.

XX. The Word "Commissary" shall include Commissary Depute, and the Term "Commissary Clerk" shall include Commissary Clerk Depute. Interpretation of Terms.

SCHEDULES TO WHICH THE FOREGOING ACT REFERS.

SCHEDULE (A).

Form of a Petition for Appointment of an Executor to a Deceased Person.

Unto the Honourable the Commissary of [*specify the County*], the Petition of *A. B.* [*here name and design the Petitioner*];

Humbly sheweth,

That the late *C. D.* [*here name and design the deceased Person to whom an Executor is sought to be appointed*] died at [*specify Place*] on or about the [*specify Date*], and had at the Time of his Death his ordinary or principal Domicile in the County of [*specify County, or* "furth of Scotland," *or* "without any fixed Domicile," *or* "without any known Domicile," *as the Case may be*].

That the Petitioner is the only Son and Next of Kin [*or state what other Relationship, Character, or Title the Petitioner has, giving him Right to apply for the Appointment of Executor.*]

May it therefore please your Lordship to decern the Petitioner Executor Dative quâ Next of Kin to the said *C. D.* [*or state the other Character in which the Petitioner claims to be appointed Executor*].

According to Justice, &c.

[*Signed by the Petitioner or his Agent.*]

SCHEDULE (B).

Roll of Petitions for Appointment of Executors in Commissary Courts in Scotland.

County.	Name and Designation of Petitioner.	Title of Petitioner.	Name and Designation of Defunct.	Place and Date of Death.
Edinburgh.	*A. B.*, Writer in Edinburgh.	Next of Kin.	*C. D.*, Merchant in Edinburgh.	No. George Street, Edinburgh, 1st January 1857.

SCHEDULE (C).

Form of Certificate by Commissary Clerk of Publication of a Petition for the Appointment of an Executor.

I, *A. B.*, Commissary Clerk [*or* "Commissary Clerk Depute," *as the Case may be*] of the County of [*specify County*], hereby certify that this Petition was intimated by affixing a Copy thereof on the Door of the Court-house [*if some other place has been directed by the Commissary, specify it*], on the [*specify Date*], and by being published by the Keeper of the Record of Edictal Citations at Edinburgh, in the printed Roll of Petitions for the Appointment of Executors in the Commissary Courts of Scotland, printed and published on [*specify Date*].—*A. B.*

SCHEDULE (D).

Form of a Testament Dative or Confirmation of the Executor of a Person who has died without naming one.

I, *A. B.*, Commissary of the County of [*specify County*], considering that by my Decree, dated [*specify Date*], I decerned *C. D.* Executor Dative quâ Next of Kin [*or other Character, as the Case may*

be] of the late *E. F.*, who died at [*specify Place*], on [*specify Date*], and seeing that the said *C. D.* has since given up on Oath an Inventory of the Personal Estate and Effects of the said *E. F.* at the Time of his Death situated in Scotland [*or* situated in Scotland and England, *or* in Scotland and Ireland, *or* in Scotland, England, and Ireland, *as the Case may be*], amounting in Value to Pounds, which Inventory has been recorded in my Court Books, of Date [*specify Date*], and that he has likewise found Caution for his Acts and Intromissions as Executor: Therefore I, in Her Majesty's Name and Authority, make, constitute, ordain, and confirm the said *C. D.* Executor Dative quâ [*specify Character*] to the Defunct, with full Power to him to uplift, receive, administer, and dispose of the said Personal Estate and Effects, and grant Discharges thereof, if needful to pursue therefor, and generally every other Thing concerning the same to do that to the Office of Executor Dative quâ [*specify Character*] is known to belong; providing always, that he shall render just Count and Reckoning for his Intromissions therewith when and where the same shall be legally required.

Given under the Seal of Office of the Commissariot [*specify County*], and signed by the Clerk of Court at [*specify Place*], the [*specify Date*].

To be signed by the Commissary Clerk or his Depute, and sealed with the Seal of Office.

SCHEDULE (E).

Form of a Testament Testamentar or Confirmation of an Executor Nominate.

I, *A. B.*, Commissary of the County of [*specify County*], considering that the late *C. D.* died at [*specify Place*], upon [*specify Date*], and that by his last Will [*or other Writing containing the Nomination of Executor*], dated [*specify Date*], and recorded in my Court Books upon [*specify Date*], the said *C. D.* nominated and appointed *E. F.* to be his Executor, and that the said *E. F.* has given up on Oath an Inventory of the Personal Estate and Effects of the said *C. D.* at the Time of his Death situated in Scotland [*or* situated in Scotland and England,

or situated in Scotland and Ireland, *or* situated in Scotland, England, and Ireland, *as the Case may be*], amounting in Value to Pounds, which Inventory has likewise been recorded in my Court Books of Date [*specify Date*]: Therefore I, in Her Majesty's Name and Authority, ratify, approve, and confirm the Nomination of Executor contained in the foresaid last Will [*or other Writing containing the Nomination of Executor*]; and I give and commit to the said *E. F.* full Power to uplift, receive, administer, and dispose of the said Personal Estate and Effects, grant Discharges thereof, if needful to pursue therefor, and generally every other Thing concerning the same to do that to the Office of an Executor Nominate is known to belong; providing always, that he shall render just Count and Reckoning for his Intromissions therewith when and where the same shall be legally required.

Given under the Seal of Office of the Commissariot of [*specify County*], and signed by the Clerk of Court at [*specify Place*], the [*specify Date*].

To be signed by the Commissary Clerk or his Depute, and sealed with the Seal of Office.

SCHEDULE (F).

I, *A. B.*, Commissary Clerk [*or* Commissary Clerk Depute] of the County of Edinburgh, hereby certify that this Grant of Probate has [*or* these Letters of Administration have] been produced in the Commissary Court of the said County, and that a Copy thereof has been deposited with me.

No. II.

INSTRUCTIONS BY COMMISSARIES OF EDINBURGH, 31ST DECEMBER 1823.

Commissaries—Gordon, Tod, Fergusson, and Ross.

Instructions to the Commissary Clerks of Edinburgh, as to Confirmations to be expede subsequent to the 1st of January 1824.

I. With a view to the proper fulfilment of the 3d section of the Act 4th Geo. IV. cap. 98, you will take care that in every case, when there is given up to be recorded either an original or an additional inventory, contains the defunct's whole moveable means and estate, so far as these come to the deponent's knowledge, and farther, that the deponent either then requires or does not require (as the case may be), a confirmation to be immediately expede. A form of the oath, with the alterations referred to in general terms, is subjoined; of course, however, such variations as circumstances render necessary will be made, consistently with the substance and object of the oath.

II. Where the oath bears that confirmation is *immediately required*, and such confirmation is accordingly expede, no *other* oath is conceived to be necessary to comply with the terms of this clause of the Act. But where the oath bears that no confirmation is at the time required, then none shall thereafter be expede (however short the interval may be), without a special oath or affidavit from the party, in which he shall, in terms of the Act of Parliament, depone to all additional articles that have been discovered since the date of the former oath, or if there are none such, he shall make oath that since the date of giving up the original or additional inventory, no other debts, goods, or effects have come to his knowledge, and that the inventory thereof already given up contains the whole moveable estate of the defunct, so far as known at the date of taking this last oath. Such special oaths or affidavits, on account of their reference to the inventory previously given up, you

will enter in the Ordinary Record of Inventories (for the ordinary expense of registration), and periodically transmit the same to the Stamp Office, along with the other inventories and oaths relative to personal estates, a separate entry of all such special oaths being made in the responde book of inventories.

III. With reference to the last clause of the Act, as to confirmations by executors-creditors, such confirmations may (if required) comprehend no more of the inventory recorded than a sum equal in amount to the debt due and the expense of confirmation, in other words, it may be a confirmation to any extent the executor desires. And in the oath upon the inventory given in to be recorded, such executors shall depone to the verity of the debt on which they may have been decerned, in terms of what appears to be the meaning of this part of the Act.

IV. Where an executor-dative intends to avail himself of the second clause in the Act, which empowers the Court to fix the amount of caution, such executor must present a written application, stating shortly the extent of the inventory to be confirmed, the amount to which he is desirous the caution should be limited, and the grounds on which his demand is founded, which application the Court will dispose of in a summary manner, with a due regard to the circumstances of the case.

V. You will continue the record of testaments and decrees as formerly. (Signed) JAMES GORDON.

CONSISTORIAL COURT OF EDINBURGH,
31st December 1823.

APPENDIX.

Form of the Oath.

At Edinburgh, the day of ,
in presence of , Commissioner,
appointed by the Honourable the Commissaries of Edinburgh for taking the following deposition. Appeared
, who, being solemnly sworn and examined,
depones, That died upon

the day of ,
and the deponent has entered upon the possession and management of the deceased's personal estate, as executor nominated by in a general disposition and deed of settlement, executed by , upon the day of , registered in the books of Council and Session, the day of , an extract whereof is now exhibited and signed by the deponent and the said Commissioner, of this date, as relative hereto (or as executor-dative decerned by the Commissaries of Edinburgh, as the case may be). That the deponent does not know of any settlement or writing relative to the disposal of the deceased's personal estate or effects, or any part of them other than that now exhibited. That the said inventory, each page of which is signed by the deponent and Commissioner, as relative hereto, is a full and true inventory of all the personal estate and effects of the said deceased wherever situated, already recovered or known to be existing, belonging or due to him beneficially at the time of his death, so far as has come to the deponent's knowledge at the date hereof, and of which inventory the deponent now requires a confirmation to be expede (or but of which inventory no confirmation is at present required), and that the value of the said estate situated in Scotland is of the value of sterling, and under the value of sterling.—All which is truth, as the deponent shall answer to God.

Edinburgh, 3d June 1825.

The Commissaries, considering that Act of Sederunt of the thirtieth December eighteen hundred and twenty three, regarding the Regulations of Court, was on the seventh January last continued till this day, Declare the same shall remain in force until recalled, or otherwise altered by the Court. (Signed) THOMAS TOD.
JAS. FERGUSSON.
GEORGE ROSS.

No. III.

ORDERS BY COMMISSARY OF EDINBURGH, 1853 AND 1858.

Edinburgh, 2d December 1853.

The attention of the Commissary having been called to the disconformity between certain oaths on inventories of personal estates, and the printed forms issued from the Inland Revenue Office, hereby directs the commissary clerk to decline to receive and record in the Commissary Court Books, all oaths with the relative inventories which he may find to be materially different from these forms.

The attention of the Commissary having been also called to the propriety of the place of the death of deceased persons being stated, either in the inventories of their personal estates, or in the relative oaths, for the purpose of ascertaining whether they died domiciled under the jurisdiction of the Commissary of Edinburgh, and in order to enable the clerk to comply with the terms of the Act of Sederunt of 20th December 1823, prescribing the forms of testaments-testamentar and testaments-dative, wherein the place of the death of the defunct is appointed to be inserted, hereby farther directs the Clerk of Court to require that the place of death be stated in every inventory or oath accordingly. (Signed) JOHN T. GORDON.

In the Commissary Court of Edinburgh, 15th November 1858.

The Commissary, in reference to the Act 21st and 22d Vict. cap. 56, entituled, "An Act to Amend the Law relating to the Confirmation "of Executors in Scotland, and to extend over all parts of the United "Kingdom the effect of such Confirmations, and of Grants of Probate "and Administration (23d July 1858)," Directs and Appoints as follows:—

1. That petitions for the appointment of executors-dative, and

other applications to the Court, be written on foolscap paper, and enveloped in cartridge paper for better preservation.

2. That the petitions for the appointment of executors-dative shall be lodged, along with two copies, with the Commissary Clerk before one o'clock of the Friday preceding the publication thereof by the keeper of the record of edictal citations in terms of section 4th of the Act, and which takes place on Monday, weekly.

3. That in place of affixing a copy of each petition for the appointment of executors-dative on the door of the Commissary Court House, the Commissary Clerk shall affix the same on the south wall of the Court room, under the gallery, where petitions for services are at present in use to be published, and also by affixing a copy on the wall of the office of the Commissary Clerk in the Parliament Square, and that both these intimations shall be certified by the Commissary Clerk in the certificate to be granted by him in terms of section 5th and schedule C of the Act.

4. That said certificate of intimation by the Commissary Clerk shall be dated, and the date in the certificate shall regulate the time within which petitions for the appointment of executors-dative may be called in Court in terms of section 6th of the Act.

5. That inventories of personal estates, with the relative testamentary writings, be lodged with the Commissary Clerk, for examination, at least twenty-four hours before the party attends to depone before the Commissary Clerk.

6. That the prints of the roll of petitions for the appointment of executors-dative, of bonds of caution for executors, of testaments-dative and testaments-testamentar, exhibited in proof by the Commissary Clerk to the Commissary, be those used.

7. That on the morning of the day of each Commissary Court, there shall be laid before the presiding Judge a roll of the cases for that Court, which shall state the names of the petitioner or party, and of the agent in each case.

(Signed) JOHN T. GORDON, *Commissary.*

No. IV.

ACT OF SEDERUNT, 19TH MARCH 1859—AND NOTE, ABSTRACT OF FEES,

INTITULED

ACT of SEDERUNT to regulate Proceedings before Commissaries, and the Fees of Clerks of Commissary Courts, under the Act of Parliament 21st and 22d Vict. cap. 56.

Edinburgh, 19th March 1859.

WHEREAS, by the Act 21 and 22 Victoria, Chapter 56, entitled, "An Act to amend the Law relating to the Confirmation of Executors "in Scotland, and to extend over all parts of the United Kingdom the "effect of such Confirmation, and the Grants of Probate and Administration," it is enacted, section 4, with reference to Petitions for the appointment of Executors, that "every such Petition, in place of being "published at the Kirk-door and Market Cross, as Edicts of Executry "have been in use to be published, shall be intimated by the Com- "missary-Clerk affixing on the door of the Commissary Court House, "or in some conspicuous place of the Court and of the Office of the "Commissary-Clerk, in such manner as the Commissary may direct, "a full copy of the Petition, and by the Keeper of the Record of "Edictal Citations at Edinburgh inserting in a book, to be kept by "him for that purpose, the names and designations of the Petitioner, "and of the deceased person, the place and date of his death, and the "character in which the Petitioner seeks to be decerned Executor, "which Particulars the Keeper of the Record of Edictal Citations "shall cause to be printed and published weekly, along with the "Abstracts of the Petitions for General and Special Services, in the "form of Schedule B, hereunto annexed; Provided always, that to "enable the Keeper of the Record of Edictal Citations to make such "publication, the Commissary-Clerk shall transmit to him the said "particulars, and to enable the Commissary-Clerk to grant the Certi- "ficate after mentioned, the Keeper of the Record of Edictal Cita- "tions shall transmit to the Commissary-Clerk a copy, certified by

" the said Keeper, of the printed and published Particulars, all in " such form and manner and on payment of such Fees as the Court " of Session by Act of Sederunt may direct." And it is farther enacted, section 18, that " it shall be competent to the Court of " Session, and they are hereby authorised and required from time to " time to pass such Acts of Sederunt as shall be necessary and proper, " for regulating in all respects the proceedings under this Act before " the Commissary of Edinburgh, and other Commissaries in Scotland, " and following out the purposes of this Act, and also the Fees to be " paid to Agents before the said Courts, and to the Commissary-Clerks " and other Officers of Court, and the expense of publication of Peti- " tions,"—

THE LORDS OF COUNCIL AND SESSION, in pursuance of the powers vested in them by the said Act, do hereby enact and declare,—

1st, That when a Petition is presented to the Commissary for the appointment of an Executor, the Commissary-Clerk of Edinburgh shall transmit, in a safe and convenient manner, and the other Commissary-Clerks shall transmit, through the Post Office, to the Keeper of the Record of Edictal Citations at Edinburgh, a Note specifying the names and designations of the Petitioner, and of the deceased person, the place and date of his death, and the character in which the Petitioner seeks to be decerned Executor; and the said Note of Particulars shall be framed as nearly as may be in the form of Schedule B, annexed to the said Act, and shall be dated and subscribed by the Commissary-Clerk.

2d, That the Keeper of the Record of Edictal Citations shall transmit, through the Post Office, to the Commissary-Clerk, a certified copy of the printed and published particulars, in the form of Schedule B annexed to the said Act, and which copy shall be dated and subscribed by the said Keeper, and the said certified Abstracts shall be preserved by the Commissary-Clerk, and made patent to all Persons desiring to see the same, on payment of the Fee specified in the Table hereto annexed.

3d, That the copies of the Abstracts of Petitions for the appointment of an Executor shall be printed by the Keeper of the Record of

Edictal Citations, and sold to the Public at such prices as may be estimated to be sufficient to pay the expense of printing the same; and the printing and sale of the said Abstracts shall be subject to the same regulations as those applicable to the Minute Book and Record of Edictal Citations, by the 22d section of the Act 1 and 2 Victoria, chapter 118.

4th, That the Certificate of Intimation to be granted by the Commissary-Clerk, in terms of Section 5 and Schedule C of the Act, shall be dated, and the date of the Certificate shall regulate the time when the Petition for appointment of an Executor may be called in Court, in terms of section 6 of the Act.

5th, That when a second Petition for Confirmation is presented in reference to the same personal estate, intimation shall be made to the party who presented the first Petition, in terms of the 5th section of the Act; and in all other respects the procedure regarding such second Petition shall be the same as that directed by the Statute and this Act in regard to a first Petition.

6th, That when a party shall be desirous to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland, any personal estate or effects of the deceased situated in England or in Ireland, or both, a statement to that effect shall be made, either in the original Petition for appointment of an Executor, or in a separate Petition to be presented to the Commissary.

7th, That the Certificate to be granted by the Commisssary-Clerk of the County of Edinburgh upon grants of Probate and Administration, in terms of Section 14 and Schedule F of the Act, shall be dated as well as subscribed by him.

8th, That all copies of Probates or Letters of Administration deposited with the Commissary-Clerk of the County of Edinburgh, under the 14th section of the said Act, shall be made patent to all Persons desiring to see the same, on payment of the Fee specified in the Table hereto annexed; and when required, the said Commissary-Clerk shall furnish copies or excerpts of said documents, on payment of the Fee specified in the said Table.

9th, That the Practitioners in the Commissary Courts shall be entitled to charge the Fees contained in the Table authorised by the Act of Sederunt of 10th March 1849, so far as applicable to the proceedings under the said Act of 21 and 22 Victoria, chap. 56.

10th, That from and after the 1st day of April next, the Clerks of all Commissary Courts shall be entitled to charge the Fees specified in the Table hereto annexed until the same shall be altered in terms of law, and no other or higher Fees shall be charged by them.

11th, That the said Clerks, and their successors in office, shall enter in a book to be kept by them for the purpose, an accurate account of the whole Fees and Emoluments received by them from the commencement of this Act, and shall, on the 1st of April in each year, or within ten days thereafter, transmit to the Queen's Remembrancer in Exchequer an Abstract of the Fees and Emoluments received by them for the year immediately preceding, in order that the amount of such Fees and Emoluments may be known.

And the Lords Appoint this Act, and the relative Table of Fees, to be inserted in the Books of Sederunt, and printed and published in common form. (Signed) DUN. M'NEILL, *I.P.D.*

TABLE of FEES for CLERKS of COMMISSARY COURTS.

	£	s.	d.
I.—In Applications for Appointments of Executors-Dative, and other Procedure, under the Act 21 and 22 Victoria, c. 56:—			
1. For receiving, examining, and marking each Petition for the appointment of an Executor-Dative, affixing copies thereof, framing and transmitting, free of charge, the Abstract thereof to the Keeper of the Record of Edictal Citations, receiving and examining Abstract published by said Keeper, writing the Certificate of Intimation on the principal Petition, including Fee on the Decree-Dative	0	10	0
2. And, in addition, when a second Petition is presented, besides the above Fees on such second Petition, if the Clerk shall be directed to intimate the same, for such intimation	0	2	6
II.—Inventories, Confirmations, and other Official Business:—			
3. For receiving and examining Inventories, with relative oath, and for receiving and examining Testamentary Writings containing appointment of Executors and relative Inventory and oath—			
When the amount of the Inventory is under £100	0	2	6
£100 and under 200	0	3	6
200 ... 300	0	5	0
300 ... 500	0	7	0
500 ... 700	0	8	0
700 ... 1,000	0	10	0
1,000 ... 3,000	0	12	6
3,000 ... 5,000	0	15	0
5,000 ... 10,000	1	0	0
10,000 ... 20,000	1	10	0
20,000 ... 40,000	2	0	0
40,000 and upwards .	3	0	0
4. For expeding Confirmations—			
a. Testaments-Dative, for all the Duties (besides the charge for Writings, see Art. 9) . .	0	3	0
Eiks thereto at same rate.			
b. Testaments Testamentar			
When the amount of the Inventory is under £50	0	1	0
£50 and under 100	0	2	6

Table of Fees for Clerks of Commissary Courts.

	£	s.	d.
When the amount of the Inventory is £100 and under £200	0	4	0
200 ... 300	0	5	0
300 ... 500	0	7	0
500 ... 1,000	0	10	0
1,000 ... 2,000	0	12	6
2,000 ... 3,000	0	15	0
3,000 ... 4,000	1	0	0
4,000 ... 5,000	1	5	0
5,000 ... 10,000	1	10	0
10,000 ... 20,000	2	0	0
20,000 ... 40,000	4	0	0
40,000 and upwards .	5	0	0
Eiks to Testaments Testamentar at same rates.			
5. For making out and receiving Bonds of Caution—			
When the Caution is under £200 . . .	0	5	0
£200 and under £500 . . .	0	7	6
£500 and upwards	0	10	0
6. For restriction of Caution, including the deliverance, and receiving and marking productions . .	0	2	6
7. For writing, viz.—			
For recording Testaments, Inventories, and all other matters required to be recorded; for extracts and copies from Records, extracts of Inventories or Testaments, including certificate on certified copies, and generally for all writings, per sheet of writing or printing . .	0	1	6
NOTE.—Every Sheet to contain 250 words; one Sheet to be charged when the whole writing does not exceed 250 words, and if there be any remaining number of words after calculating the number of Sheets of 250 words each, such remainder to be charged as an additional Sheet.			
8. To the Commissary Clerk of Edinburgh—			
a. For collation of English and Irish Probates, or Letters of Administration, per sheet of 250 words	0	0	2
b. For entering abstracts of such Probates, or Letters of Administration, in the Commissary Books, and granting Certificate, in form of Schedule (F)	0	10	6
9. For furnishing materials for and appending the Seal of Court to Confirmations and other writs .	0	1	0
10. Attendance at sealing Repositories or other similar business (exclusive of the fee for marking the Petition), per hour	0	6	8
11. For Searches:—			
a. For giving inspection of any of the Records of Court, and in Edinburgh, of any Copy Probate			

Table of Fees for Clerks of Commissary Courts.

	£	s.	d.
lodged with the Clerk, each case, when not exceeding five years back	0	1	0
If beyond five years	0	2	6
b. For searching for a process or any particular document, when the search is made by the Clerk, including Certificate of Search, when required. If beyond one year, and not exceeding five	0	2	6
Five years and upwards	0	5	0
12. For Certificates of Registration of Testamentary and other documents	0	2	6
13. For each Caveat	0	2	6
III.—Judicial Business:—			
14. For receiving, and marking, and calling every Summons or original Petition, others than those under No. 1	0	1	0
15. For every Defence, Answer, and Reply . . .	0	1	0
16. For receiving and marking each Set of Productions, except the first	0	0	6
17. For each Deposition of a Witness, including attendance at proofs	0	0	9
18. For lending or receiving back Process, and comparing the same with the Inventory, and scoring the receipt	0	0	6
19. For Diligence to Cite Witnesses, writing included .	0	1	0
20. For second ditto do	0	1	6
21. For Arrestments and loosing of ditto, each . .	0	1	0
22. For Caption to compel production of Process . .	0	0	6
23. For marking intimation of Sists on Bills of Advocation, and sisting procedure	0	2	6
24. For each Deliverance or Decree, except those under Nos. 1 and 6	0	2	6
25. For Edicts of Curatory	0	1	0
26. For an Act of Curatory, per sheet	0	1	0
27. For Extracts (Judicial), per sheet	0	1	0

Dun. M'Neill, *I.P.D.*

Note.—An Abstract agreeably to the following classification is recommended for transmission by Commissary-Clerks to the Queen's Remembrancer, in terms of section 11 of the Act of Sederunt of 19th March 1859, between 1st and 10th April annually.—*Ed.*

Annual Return of Commissary Clerks' Fees.

ABSTRACT of the FEES and EMOLUMENTS received by the Commissary Clerk of the County of , from 1st day of April 1859, to 1st day of April 1860, under the Act of Sederunt of 19th March 1859.

	£	s.	d.
1. Petitions for Appointment of Executors-dative, chargeable under Articles 1 and 2 of Table of Fees			
2. Inventories, &c., chargeable under Article 3 of Table			
3. Testaments-dative and Eiks chargeable under Article 4 (*a*) of Table . .			
4. Testaments-Testamentar and Eiks chargeable under Article 4 (*b*) of Table .			
5. Bonds of Caution chargeable under Article 5 of Table			
6. Restrictions of Caution chargeable under Article 6 of Table			
7. Writings and Printing under Article 7 of Table			
8. Seals chargeable under Article 9 of Table			
9. Searches chargeable under Article 11 of Table			
10. Certificates of Registration chargeable under Article 12 of Table			
11. Miscellaneous, chargeable under other Articles of the Table			
Total . £			

(Signed) *A. B., Commissary Clerk.*

[*Place and Date.*]

No. V.

EIKS.

1.—FIRST EIK to the Testament-Dative, Umquhile

I, JOHN THOMSON GORDON, Esquire, Commissary of the County of Edinburgh, considering that by my decree, dated
I Decerned Execut
Dative *qua* of the late
who died at on
and that the said
gave up an Inventory of the Personal Estate and Effects of the said
and expede a Testament-Dative upon
And seeing that the said
ha now given up on Oath, an Additional Inventory of the Personal Estate of the said
at the time of h death, situated in
amounting in value to
which Additional Inventory has been recorded in my Court Books, of
and that ha likewise found caution for Acts and Intromissions as Execut Therefore, I, in Her Majesty's name and authority, of new, MAKE, CONSTITUTE, ORDAIN, and CONFIRM the said

Execut dative *qua* to the Defunct, with full power to to uplift, receive, administer, and dispose of the said personal estate and effects contained in the foresaid additional Inventory, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of Executor-Dative *qua* is known to belong: Providing always that shall render just count and reckoning for intromissions therewith, when and where the same shall be legally required.

Given under the Seal of Office of the Commissariot of Edinburgh, and signed by the Clerk of Court at Edinburgh, the day of Eighteen hundred and fifty .

(Signed) W. ALEXANDER, *Commissary Clerk.*

2.—FIRST EIK to the Testament-Testamentar, Umquhile

I, JOHN THOMSON GORDON, Esquire, Commissary of the County of Edinburgh, considering that
died at on
and that
as Execut Nominate of the said
under and in virtue of
gave up an Inventory of personal Estate and Effects, and expede a Testament-Testamentar upon
And seeing that the said
ha now given up, on Oath, an Additional Inventory of the personal Estate of the said
at the time of death, situated in
amounting in value to
which Additional Inventory has been recorded in my Court Books, of date Therefore I, in Her Majesty's name and authority, of new RATIFY, APPROVE, and CONFIRM the nomination of Execut contained in the foresaid

AND I GIVE AND COMMIT to the said
full power to uplift, receive, administer, and dispose of the said Personal Estate and Effects contained in the foresaid Additional Inventory; grant discharges thereof, if needful to pursue therefor; and generally every other thing concerning the same to do that to the office of an Executor-Nominate is known to belong: Provided always, that shall render just count and reckoning for intromissions therewith, when and where the same shall be legally required.

Given under the Seal of Office of the Commissariot of Edinburgh, and signed by the Clerk of Court at Edinburgh, the day of Eighteen hundred and fifty .

(Signed) W. ALEXANDER, *Commissary Clerk.*

No. VI.

FORMS OF INVENTORIES, and Relative Oaths recommended by the Inland Revenue Office, with Additions required at Commissary Office, Edinburgh.

1.—FORM to aid in the Preparation of Inventory—Party dying domiciled in Scotland—for Exhibition in the Proper Commissary Court, 48th Geo. III., c. 149, § 38, 21st and 22d Vict., c. 56.

INVENTORY of the Personal Estate, *situated in Scotland, England, and Ireland*, of (name and description of deceased) who died at on the day of 18 .

SCOTLAND.	£	s.	d.
1. Cash in the house			
2. Household furniture, silver plate, and other effects in the deceased's house—conform to appraisement			
3. Stock in trade and other effects belonging to the deceased, conform to appraisement .			
4. Balance due to the deceased on an account current with the Bank, and interest to the date of death . . .			
5. Debts due to the deceased upon the following documents, with interest to the date of death—			
Bond (describe each bond) . .			
Bill (describe each bill) . . .			
6. Book debts due to the deceased by the following parties (name and address of the debtors, and amount due by each to be given, but only the true value of the debt to be extended out so as to affect the duty)			

Form of Inventory.

	£	s.	d.	
7. Rents of heritage due by the following tenants, falling under executry . .				
N.B.—Landed Property.—If the deceased survive Whitsunday, one moiety of the rents of the crop of that year is personal estate. If he survive Martinmas, the whole rents of that crop fall into the Executry. Where the deceased is a liferenter or heir of Entail, and the rents are payable under instruments dated subsequent to 16th June 1834, a proportion corresponding to the period from the preceding term to the date of death, is also personal, 4 Gul. IV. c. 22. *House Property.*—The term's rents current at the death are personal. The Apportionment Act would appear not to apply to the rents of property held by the deceased in fee-simple. See Baillie *v.* Lockhart, House of Lords, 23d April 1855.				See Remark in text, p. 53, as to Apportionment Act, and Appendix, No. X.—*Ed.*
8. Shares at £100 in the Edinburgh and Glasgow Railway at the price of £ .				
9. Shares at £100 of the Bank of Scotland at the price of £ . . .				
ENGLAND.				
1. Exchequer Bills £ at the price of £ .				
2. East India Stock £ at the price of £ .				
3. 3 per cent Consols £ at the price of £				
IRELAND.				
1. Shares of the Bank of Ireland at £ .				
2. Shares at £50 in Midland Great Western Railway, Ireland, at the price of £ .				
Note.—Any other personal property situated in *Scotland*, *England*, or *Ireland*, may be set forth in the Inventory in terms similar to the above.]				
Amount of Estate in Scotland, England, and Ireland . . . . £				

Personal estate abroad (describe the property and where locally situated).

Form of Oath in case of Intestate Succession.

2.—FORM of OATH where the deceased *has not left* any Testament or other Writing relating to the Disposal of his Personal Estate, or any part thereof.

AT , the day of One thousand eight hundred and in presence of , Esq., Commissary of the Commissariot of (or Commissary Depute, Commissioner appointed by the Commissary, or Commissary Clerk, or his Depute, or Magistrate, Justice of the Peace, or British Consul), APPEARED who being solemnly sworn and examined, depones, That (name and description of deceased) died intestate at on the day of : That the Deponent has entered (or is about to enter) upon the possession and management of his personal or moveable estate, as executor *qua* nearest of kin (*qua* relict or *qua* creditor, as the case may be): That the deponent knows of no settlement or other writing left by the deceased relative to the disposal of his personal estate or effects, or any part thereof: That the foregoing Inventory, each page of which is signed by the deponent and the said Commissary, as relative hereto, is a full and complete inventory of the personal estate and effects of the said deceased, wherever situated, and belonging or due beneficially to the deceased at the time of his death, in so far as the same has come to the deponent's knowledge; and that the said estate, situated in the United Kingdom, is of the value of Pounds, and under the value of Pounds. [*Here state in conformity with the instructions of the Commissaries, dated* 31*st December* 1823, *whether confirmation is or is not required, and in whose favour*—ED.]—All which is truth, as the deponent shall answer to God.

Form of Oath in case of Testate Succession.

3.—FORM of OATH where the deceased *has left* a Testament or other Writing relating to the Disposal of his Personal Estate, or any part thereof.

AT , the day of One thousand eight hundred and in presence of Esq., Commissary of the Commissariot of (or Commissioner appointed by the Commissary, or as the case may be), APPEARED executor of the deceased who being solemnly sworn and examined, depones, That the said (name and description of deceased) died at upon day of , and the deponent has entered upon the possession and management of the deceased's estate as executor, nominated by him in a general disposition and deed of settlement, executed by him upon the day of , registered in the Books of Council and Session on the day of , an extract whereof is now exhibited and signed by the deponent and the said Commissary (or Commissioner), of this date, as relative hereto: That the deponent does not know of any settlement or writing relative to the disposal of the deceased's personal estate or effects, or any part thereof, other than that now exhibited: That the said Inventory, each page of which is signed by the deponent and the said Commissary (or Commissioner), as relative hereto, is a full and complete Inventory of the personal estate and effects of the said deceased wheresoever situated and belonging or due to him beneficially at the time of his death, in so far as the same has come to the deponent's knowledge; and that the said estate, situated in the United Kingdom, is of the value of Pounds, and under the value of Pounds. [*Here state in conformity with the Instructions of the Commissaries, dated* 31*st December* 1823, *whether Confirmation is or is not required, and in whose favour*—ED.]—All which is truth, as the deponent shall answer to God.

4.—FORM to Aid in the Preparation of an Additional Inventory, Party Dying Domiciled in Scotland, for Exhibition in the proper Commissary Court.

ADDITIONAL INVENTORY of the Personal Estate situated in Scotland, England, and Ireland, of (*Name and Description of the Deceased*) who died at upon the day of 185 .

		£	s.	d.
	Amount of the Estate situated in Scotland, England, and Ireland, given up in the Inventory recorded in the Commissary Court Books of on the day of 185			
	SCOTLAND.			
	Effects Undervalued.			
I.	1. Value of the stock of wood given up in the Inventory —*Item* No. at . . Produce when sold . .			
	Difference			
	2. Debt due on Open Account by valued in the Original Inventory— *Item* No. at . . . But the Debt has been recovered in full . . .			
	Difference			
	Effects Omitted.			
II.	1. Debts amounting to £ ranked on the Trust Estate of upon which a final Dividend has been declared of 12s. per pound . . .			

	£	s.	d.
Note.—The Deceased's books did not show the existence of this debt, and the claim was not discovered until after the Inventory was recorded.			
Amount of the Estate situated abroad, given up in the former Inventory, £			
£			

Note.—Inventory Duty on the total Estate in Scotland, England, and Ireland, is . . . . . £

The Duty paid on the former Inventory . . . . . .

The Duty on the additional Inventory . . . . . £

Mem.—It is desirable that Additional Inventories as well as other Inventories should be written on paper the size of Foolscap.

FORM of AFFIDAVIT to an ADDITIONAL INVENTORY.

At the day of
One Thousand Eight Hundred and Fifty

In presence of Commissary of the Commissariot of [*or* Commissary-Depute, *or* Commissioner appointed by the Commissary, *or* Commissary Clerk or his Depute, *or* Magistrate, *or* Justice of the Peace, *or* British Consul]

Appeared [*Name and Description*] one of the Executors nominated by the said Deceased [*or* Executor-Dative *qua* of the Deceased], who being solemnly sworn and examined, depones, That the foregoing is an Additional Inventory of the Personal Estate in Scotland, England, and Ireland, of the said Deceased as ascertained and discovered since the day of when the original Inventory of the Deceased's Estate was Recorded

Additional Inventory and Oath.

in the Books of the Commissary Court of the Commissariot of

That the said Inventory, which is signed as relative hereto, is a full and true Inventory of all the Personal or Moveable Estate or Effects of the said Deceased wheresoever situated, already recovered, or known to be existing, belonging or due to him beneficially at the time of his death. That the deponent has not discovered any other Estate or Effects belonging to the Deceased; and that the said Estate, situated in the United Kingdom, is of the value of and under the value of [*Here state, in conformity with the instructions of the Commissaries dated* 31*st December* 1823, *whether an eik to the confirmation, or if no confirmation has previously been expede, whether confirmation of the whole estate contained in the original and additional inventories, is or is not now required, and in whose favour*—ED.]—All which is truth, as the deponent shall answer to God.

No. VII.

OATH for CONFIRMATION after Inventory has been given up.

FORM of OATH when Confirmation is required after an interval, however short, has elapsed since the Inventory has been given up and recorded in the Commissary Court Books.

At Edinburgh, the day of
One Thousand Eight Hundred and Fifty

In presence of

Appeared *A. B.*, one of the Executors nominated by [*or* Executor-dative *qua* to] the deceased *C. D.*, who died at on the who being solemnly sworn and examined, depones, That an Inventory of the Personal Means and Estate of the said deceased *C. D.*, amounting to the sum of was given up by the deponent to be recorded in the Commissary Court Books of Edinburgh, on the day of Eighteen hundred and That the Deponent, along with his Co-executor, had entered, or was about to enter, upon the possession and management of the deceased's Personal Estate, but no confirmation was then required. That since the said Inventory was given up, no other Personal or Moveable Estate and Effects belonging to the said deceased *C. D.* has come to the Deponent's knowledge, but that Confirmation of the estate contained in the aforesaid Inventory is now required in favour of the Deponent and [*name any other Executors*] as Executors-dative *qua* to the said deceased, decerned by the Commissary of Edinburgh, on the day of Eighteen hundred and (*or* as Executors nominated by the deceased in his Last Will and Testament, dated and also recorded in the Commissary Court Books of Edinburgh (*along with any other Testamentary Writings*), on the day of Eighteen hundred and (*Here state whether any of the Executors named by the deceased have died or declined to accept.*)—All which is truth, as the Deponent shall answer to God.

No. VIII.

DUTIES ON INVENTORIES.

ABSTRACT of DUTIES on INVENTORIES, Testate and Intestate.

Estates.		Duties.		Estates.		Duties.	
		Testate.	Intestate.			Testate.	Intestate.
	and under				and under		
£20	£50	...	10s.	£30,000	£35,000	£450	£675
20	100	10s.	...	35,000	40,000	525	785
50	100	...	£1	40,000	45,000	600	900
100	200	£2	3	45,000	50,000	675	1,010
200	300	5	8	50,000	60,000	750	1,125
300	450	8	11	60,000	70,000	900	1,350
450	600	11	15	70,000	80,000	1,050	1,575
600	800	15	22	80,000	90,000	1,200	1,800
800	1,000	22	30	90,000	100,000	1,350	2,025
1,000	1,500	30	45	100,000	120,000	1,500	2,250
1,500	2,000	40	60	120,000	140,000	1,800	2,700
2,000	3,000	50	75	140,000	160,000	2,100	3,150
3,000	4,000	60	90	160,000	180,000	2,400	3,600
4,000	5,000	80	120	180,000	200,000	2,700	4,050
5,000	6,000	100	150	200,000	250,000	3,000	4,500
6,000	7,000	120	180	250,000	300,000	3,750	5,625
7,000	8,000	140	210	300,000	350,000	4,500	6,750
8,000	9,000	160	240	350,000	400,000	5,250	7,875
9,000	10,000	180	270	400,000	500,000	6,000	9,000
10,000	12,000	200	300	500,000	600,000	7,500	11,250
12,000	14,000	220	330	600,000	700,000	9,000	13,500
14,000	16,000	250	375	700,000	800,000	10,500	15,750
16,000	18,000	280	420	800,000	900,000	12,000	18,000
18,000	20,000	310	465	900,000	1,000,000	13,500	20,250
20,000	25,000	350	525	1,000,000 and upwards.		15,000	22,500
25,000	30,000	400	600				

No. IX.

LEGACY AND RESIDUE DUTIES.

RATES of DUTY payable on Legacies, Annuities, and Residues, &c., of the Amount or Value of £20 or upwards, by statute 55th Geo. III. cap. 184.

The description of the Residuary Legatee or Next of Kin *to be in the following words of the Act.*	Out of *Personal* Estate only, if the Deceased died any time *before* or upon the 5th April 1805.	Out of Real or Personal Estate, if the Deceased died *after* the 5th April 1805.
To children* of the deceased, and their descendants, or to the father or mother, or any lineal ancestor of the deceased .	(No Legacy Duty.)	£1 per cent.
To brothers and sisters of the deceased, and their descendants	£2 : 10s. per cent.	£3 per cent.
To brothers and sisters of the father or mother of the deceased, and their descendants	£4 per cent.	£5 per cent.
To brothers and sisters of the grandfather or grandmother of the deceased, and their descendants	£5 per cent.	£6 per cent.
To any person in any other degreee of collateral consanguinity, or to any stranger in blood to the deceased . .	£8 per cent.	£10 per cent.

* This applies only to *lawful* children of the deceased, illegitimate children being subject to Duty at the rate of £10 per cent.

Where any legatee shall take two or more distinct legacies or benefits under any will or testamentary instrument, which shall together be of the amount or value of £20, each shall be charged with duty, although each or either may be separately under that amount or value.

The husband or wife of the deceased is not subject to the duty on legacies, annuities, and residues. If the legatee's husband or wife is of nearer consanguinity than the legatee, duty is payable according to such nearer relationship.—16th and 17th Vict. cap. 51, § 11.

No. X.

INVENTORY shewing Varieties of Personal Property.

FORM of INVENTORY shewing Method of entering Various Items of Personal Estate, and relative Oath, where some of the Executors named by the deceased have predeceased him, and where others have declined to accept.

INVENTORY of the Personal Estate and Effects of A. B., who died in London while temporarily residing there on 2d August 1858, and had at the time of his death his ordinary or principal Domicile in the County of Edinburgh; given up by the surviving and accepting Executors nominated by the said deceased in his Last Will and Testament, dated 1st January 1854.

	£	s.	d.
1. Cash in the house and repositories of the deceased at the time of his death	10	0	0
2. Principal sum due on deposit receipt granted by the Bank of Scotland, dated 2d August 1857 . . . . . £500 0 0			
Interest thereon to date of death, at 2½ per cent 12 10 0			
	512	10	0
3. Balance at credit of the deceased on account-current with the Bank of Scotland, with interest to date of death	87	10	0
4. BANK STOCK, viz.—			
One thousand pounds of the capital stock of the Bank of Scotland, standing in name of the deceased (*or in such other name or names as may hold it in trust for his behoof*), at £190 per cent	1900	0	0
One thousand pounds of the capital stock of the Royal Bank, standing in name of the deceased (*or in such name or names as may hold the same for his behoof*), at £132 per cent . . .	1320	0	0
Carry forward . .	3830	0	0

Inventory shewing Varieties of Personal Property.

	£	s.	d.
Brought forward . .	3,830	0	0
One thousand pounds of the capital stock of the British Linen Company, at £210 per cent .	2,100	0	0
One thousand pounds of the paid up capital stock of the Incorporation of the Commercial Bank of Scotland at £212 per cent . . .	2,120	0	0
One thousand pounds of the consolidated capital stock of the National Bank of Scotland, at £167 : 10s. per cent	1,675	0	0
5. Railway Stock, Shares, and Debentures—			
One thousand pounds of the consolidated ordinary stock of the Edinburgh and Glasgow Railway Company, at £64 per cent	640	0	0
One thousand pounds of the preference stock of the North British Railway Company, at £108 : 10s. per cent	1,085	0	0
Forty £5 per cent preference shares of the Caledonian Railway Company, at £26 : 10s. per share	1,060	0	0
One thousand pounds of the debenture stock of the Edinburgh, Perth, and Dundee Railway Company, at £100 : 5s. per cent . . .	1,002	10	0
Mortgage (second class) No. by the Edinburgh, Perth, and Dundee Railway Company to the deceased, his administrators and assigns, dated 1st November 1853, for £807 : 10s., bearing interest at the rate of 3 per cent, valued at	600	0	0
Fifteen £10 shares of the East of Fife Railway Company, valued at amount paid up, viz.— Deposit of £1 per share . . £15 0 0 First call of 20 per cent per share 30 0 0	45	0	0
6. Shop furniture and stock in trade in the deceased's shop and premises, No. George Street, Edinburgh, per valuation and appraisement by licensed appraiser in Edinburgh .	1,000	0	0
7. Amount at credit of deceased with the firm of B. and Company, of which the deceased was a partner, including value of his share of the stock in trade, utensils, implements of trade, and office furniture, as per agreement with surviving partner .	5,000	0	0
Carry forward . .	20,157	10	0

Inventory shewing Varieties of Personal Property.

	£	s.	d.
Brought forward . .	20,157	10	0
8. Twenty-four sixty-fourth shares of the Barque X. Y. of Leith, and her boats, tackle, and appurtenances, appraised by M., licensed auctioneer and appraiser at Leith	262	5	0
9. Bill drawn by deceased upon, and accepted by, C. D., dated 1st July 1858, and payable three months after date, for . . £100 0 0			
Deduct discount from 2d August to 3d October 1 0 0	99	0	0
10. Promissory note by F. G. to deceased, dated 1st June 1858, and payable on 1st December 1858.	500	0	0
11. Principal sum of £1000 contained in personal bond by L. M. in favour of the deceased, dated 1st January 1858 . . . . £1000 0 0			
Interest due thereon from 15th May to date of decease, at 4 per cent . 8 13 2	1,008	13	2
12. Principal sum of £1000 contained in personal bond and assignation in security by L. M., dated 1st July 1850, and by which bond and assignation there is also assigned, in security of the same, a policy of insurance on the life of the said L. M., with the S. Assurance Company for £1000, No. , dated 1st January 1850. £1000 0 0			
Interest due thereon from 15th May to date of decease, at 4 per cent . 8 13 2	1,008	13	2
13. RENTS,* INTERESTS, and ANNUITIES due under leases or other instruments granted *previous* to 16th June 1834—			
Rent of agricultural farm of W. for crop and year 1858, payable at Martinmas 1858 and Whitsunday 1859 . . . . £400 0 0			
One half of which is due to the executors . .	200	0	0
NOTE.—*If the year's rent has been payable by anticipation, and is already* in bonis *of the proprietor at the time of his decease, then the whole goes to his executors.*			
Carry forward . .	23,236	1	4

* It is competent to deduct interest between the date of death and the time when the rent becomes due.

Inventory shewing Varieties of Personal Property.

		£	s.	d.
	Brought forward . .	23,236	1	4
	Rents of houses in Princes Street, Edinburgh, for the term from Whitsunday to Martinmas current at the death of the deceased, viz.—			
	House occupied by B. A. . £30 0 0			
	Do. do. C. B. . 40 0 0			
	Shop do. D. C. . 70 0 0			
	£140 0 0			
	Deduct Interest from 2d August to 11th November . . . 1 8 0	138	12	0
	Feu-duties payable at Whitsunday last, due by the following parties, viz.—			
	E. D. for property at C. . . £9 0 0			
	F. E. do. D. . 11 0 0	20	0	0
	Interest for half-year ending Whitsunday last on heritable bond by F. G. to the deceased, dated 1st January 1830, per £1000, at 4 per cent per annum	20	0	0
	Proportion of annuity due by heritable bond of redeemable annuity for £1000, over estate of X by J. P., in favour of deceased, dated 1st January 1830, at 4 per cent, payable at Whitsunday last £20 0 0			
	Proportion of the annuity from Whitsunday to 2d August, the date of the death of the deceased, also due to his executors, in terms of the said bond, which contains a special stipulation to pay "daily and continually," 79 days 8 10 6	28	10	6
14.	RENTS, INTERESTS, and ANNUITIES, due under leases or other instruments granted *subsequent* to 16th June 1834—			
	Rent of agricultural farm of Y. for crop year 1858:			
	1. Half-year to Whitsunday 1858 £200 0 0			
	2. Proportion from Whitsunday to 2d August, 79 days . 86 11 6			
	286 11 6			
	Deduct interest from date of death to Martinmas 1858, when the same became payable . . 3 19 3	282	12	3
	Carry forward .	23,725	16	1

Inventory shewing Varieties of Personal Property.

				£	s.	d.
	Brought forward . .			23,725	16	1
	One half of rent of grass farm of Z. for crop 1858, payable at Martinmas 1858 .	£100	0 0			
	Proportion from Whitsunday to 2d August, 79 days . .	43	5 9			
		£143	5 9			
	Deduct interest from date of death till Martinmas, when the same became payable . . .	1	19 7			
				142	6	2
	Rents of house property in George Street for the term from Whitsunday to Martinmas current at the death of the deceased, viz.—					
	House occupied by M. N. .	£15	0 0			
	Do. do. N. P. .	20	0 0			
	Shop do. P. M. .	35	0 0			
		£70	0 0			
	Deduct interest from 2d August to 11th November . . .	0	14 0			
				69	6	0
	Feu duties by the following parties, payable at Whitsunday last—					
	X. Y. for property at Z. . .	£17	0 0			
	Y. X. do. do. . .	23	0 0			
		£40	0 0			
	Proportion for period from Whitsunday to 2d August . . .	8	10 6			
				48	10	6
	Interest due on heritable bond by R. S. to the deceased, dated 1st July 1850, per £1000, at 4 per cent per annum. Proportion from Whitsunday 1858 to date of decease . .			8	11	0
	Proportion of annuity due by heritable bond of redeemable annuity for £2000 over the estate of W. by R. S. in favour of deceased, dated 1st July 1850, at 4 per cent perannum, for period from Whitsunday 1858 to date of decease .			17	2	0
15.	Household furniture and other articles belonging to the deceased in his house at George Street, conform to inventory and valuation by J. K., licensed appraiser, dated 1st September 1858 .			500	0	0
16.	Household furniture, bed and table linen, plate,					
	Carry forward . .			24,511	11	9

Inventory shewing Varieties of Personal Property.

	£	s.	d.
Brought forward . .	24,511	11	9
wine, pictures, books, articles of vertu, and other effects in his house at X.; also carriages, horses, harness, &c., all conform to inventory and valuation by J. K, licensed appraiser, Edinburgh, dated 3d September 1858	1,000	0	0
17. Farm stocking, implements of husbandry, and proportion of crop on the deceased's farm at X., conform to appraisement by J. K., licensed appraiser, dated 3d September 1858	1,500	0	0
18. The deceased's share of the personal estate of the deceased G. F., who by his last will and testament, dated 1st January 1856, directed X. Y., and Z., residing at Glasgow, the trustees and executors therein named, to pay to the said deceased A. B., absolutely, one moiety of the proceeds from the sale, conversion, and getting in of his estate The estate has not yet been fully realised, but the deceased's share is estimated in the meantime at *	4,000	0	0
19. Book Debts due by the following parties—			
T.S., No. Princes Street, Edinburgh £40 0 0			
S.D., No. George Street, do. 20 0 0			
L.D., merchant in Dalkeith . . 10 0 0			
	70	0	0
Considered Doubtful.			
S. L., formerly in Edinburgh, now in Aberdeen £16 0 0			
D. L., No. Queen Street, Edinburgh 8 0 0			
£24 0 0			
Estimated at 5/ per pound	6	0	0
20. Principal sum contained in policy of insurance on the life of the deceased by the S. Insurance Company, dated 1st January 1850, No. , for £1000. 0 0			
Deduct interest from date of death to 2d February 1859, when payment became due . . . 25 0 0			
	1,025	0	0
Carry forward . .	32,112	11	9

* A claim of this description is to be considered Scotch or other estate, from the residence of the trustees, and not from where the trust-funds are situated, or where the truster died.

Inventory shewing Varieties of Personal Property.

				£	s.	d.
	Brought forward . .			32,112	11	9
21.	Principal sum contained in policy of insurance on the life of the deceased by the L. Insurance Company, dated 1st January 1850, No. , for	£1000	0 0			
	Vested bonuses on said policy .	500	0 0			
	Prospective bonuses thereon . .	200	0 0			
		1700	0 0			
	Deduct interest from date of death to 2d November 1858, when said policy became payable . .	21	5 0			
				1,679	15	0
22.	Policy of insurance for £1000 on the life of C. D. granted by the M. Insurance Company, dated 1st January 1850, No. , assigned to the deceased by the said C. D. as per endorsement thereon, dated 1st January 1855. Value at date of decease estimated at			300	0	0
23.	Principal sum contained in policy of insurance by the N. Insurance Company in favour of deceased, dated 1st January 1850, No. ,	£1000	0 0			
	Deduct advance made by the said Insurance Company, in security of which said policy was assigned to them, by assignation dated 1st January 1856	£500	0 0			
		500	0 0			
	Deduct interest from date of death to 2d November, when the policy is payable	6	5 0			
				494	15	0
24.	Principal sum contained in policy of insurance on the life of the deceased by the S. Insurance Company, dated 1st January 1857, No. ,	£1000	0 0			
	This policy was, by assignation dated 21st January 1857, conveyed to the Commercial Bank, in security of a cash-credit by the deceased with the said bank. The amount standing at the debit of the deceased in the books of the said bank at the date of his death, including interest, was	400	0 0			
	Balance . .			600	0	0
	Carry forward . .			35,187	1	9

Inventory shewing Varieties of Personal Property.

	£	s.	d.
Brought forward . .	35,187	1	9
25. Ten shares of the capital stock of the Standard Life Insurance Company, held by the deceased A. B. as executor of his brother C. B., and in which he was beneficially interested, at £30 per share .	300	0	0
26. Claim in process of multiplepoinding X. *v.* Y. presently depending before the Court of Session. The sum which may be recovered under the action depends on questions of law and fact not yet finally decided or fully ascertained. Estimated value of claim	1,000	0	0
Amount of personal estate in Scotland .	36,487	1	9

(Signed) C. D., (*Executor.*)
I. M., *J.P.*

At Edinburgh, the Twentieth day of April Eighteen hundred and fifty-nine,—

In presence of J. M., Esquire, one of Her Majesty's Justices of the Peace for the County of Mid-Lothian.

COMPEARED C. D., merchant in Edinburgh, who being solemnly sworn and examined, depones, That the deceased A. B., Writer to the Signet in Edinburgh, died at London on the second day of August eighteen hundred and fifty-eight, and had at the time of his death his ordinary or principal domicile in the County of Edinburgh: That the deponent, along with E. M. or B., relict of the said defunct, and D. B., Solicitor before the Supreme Courts of Scotland, have entered upon the possession and management of the deceased's estate as executors nominated by him in his last will and testament, dated the first day of January eighteen hundred and fifty, which, along with two codicils, dated respectively the first day of June eighteen hundred and fifty-four, and first August eighteen hundred and fifty-six, and a holograph letter of directions, dated first January eighteen hundred and fifty-seven, is now exhibited and signed by the deponent and the said Justice of the Peace, of this date, as relative hereto: That J. L., whom the deceased nominated as his executor in the said last will and testament, predeceased the testator, and R. S., whom the

deceased also nominated an executor in the codicil dated 1st June 1854, has declined to accept, conform to declinature dated 31st August 1858, herewith produced, and to be deposited with the Commissary Clerk: That the deponent does not know of any settlement or writing relative to the disposal of the deceased's personal estate or effects, or any part thereof, other than those now exhibited: That the said inventory, each page of which is signed by the deponent and the said Justice of the Peace as relative hereto, is a full and complete inventory of the personal estate and effects of the said deceased A. B., wherever situated, and belonging or due to him beneficially at the time of his death, in so far as the same has come to the deponent's knowledge; and that the said estate, situated in the United Kingdom, is of the value of Thirty-five thousand pounds, and under the value of Forty thousand pounds: That the deponent requires confirmation to be expede in favour of himself and the other surviving and accepting executors.—All which is truth, as the deponent shall answer to God.

(Signed) C. D., (*Executor*).
I. M., *J. P.*

No. XI.

CAUTION.

1.—ACT of CAUTION in the Commissary Court Books of Edinburgh.

Edinburgh, the day of Eighteen Hundred and

COMPEARED who becomes Caution that the sum of contained in the testament-dative of umquhile wherein is only executor-dative *qua* decerned and to be confirmed to the said defunct, shall be made free and furthcoming to all parties having interest therein as law will; and the said Executor becomes bound for the Cautioner's relief in the premises, and both parties subject themselves, their heirs and successors, to the jurisdiction of the Commissary of Edinburgh in this particular, and appoint the clerk's office in Edinburgh as a domicile whereat they may be cited to all diets of Court.

(Signed) [*Name of Cautioner.*]

2.—BOND of CAUTION in the Commissary Court Books of Edinburgh.

I, do hereby bind and oblige me, my heirs and successors, as Cautioners and Sureties acted in the Commissary Court Books of Edinburgh, that the sum of sterling, contained in the testament-dative of umquhile wherein is only executor-dative *qua* decerned and to be confirmed to him, shall be made free and furthcoming to all parties having interest therein, as law will; the said Executor being always bound for my relief as Cautioner in the premises, and both

parties subject themselves, their heirs and successors, to the jurisdiction of the Commissary of Edinburgh in this particular; and appoint the Commissary Clerk's Office in Edinburgh as a domicile whereat they may be cited to all diets of Court, at the instance of all and sundry having interest therein, as law will, holding any citation legally affixed and left for us upon the walls of said office as sufficient as if we were personally summoned.—IN WITNESS WHEREOF.

3.—ATTESTATION of CAUTIONER by Justice of Peace.

Executry.

I, one of Her Majesty's Justices of the Peace for the of , do hereby CERTIFY, that is reputed a good and sufficient Cautioner for the sum of being the amount of the Inventory of the personal Estate of the deceased to whom ha craved to be confirmed Execut *qua* by the Commissary of Edinburgh.

[*Name.*]

[*Place and Date.*]

No. XII.

FORMS OF TESTAMENTARY DEEDS.

1.—DEED of NOMINATION of Executors of Moveable Estate.

I, A., being desirous to provide for the management and disposal of my moveable estate after my death, DO hereby MAKE, CONSTITUTE, and APPOINT B. to be my sole executor and administrator, WITH FULL POWER to him to intromit with my whole moveable estate, and executry of every description, to give up inventories thereof, to confirm the same, and generally, to do everything in the premises competent to an Executor: DECLARING ALWAYS, that the said B. shall be accountable to my lawful heirs for his intromissions in virtue hereof, after payment of all my lawful debts, deathbed and funeral charges, the necessary expenses to be laid out in confirming and recovering my said means and estate, and any legacies I may leave by any deed or separate writing under my hand; AND I CONSENT to the registration hereof, and of any codicil or codicils which I may afterwards annex hereto, in the books of Council and Session, or others competent, therein to remain for preservation, and to that effect constitute my procurators.—IN WITNESS WHEREOF.

2.—SPECIAL DISPOSITION AND SETTLEMENT.

(*Juridical Styles, 4th Edition, vol. i., p.* 271.)

I, A., for the love and favour which I have and bear to B., and for other good causes and considerations, do hereby GIVE, GRANT, ASSIGN, and DISPONE, to and in favour of the said B., and his heirs and assignees whomsoever, heritably and irredeemably, my whole means and estate, heritable and moveable, real and personal, wherever situated or addebted, which shall belong or be addebted to me at the time of my death, with the whole vouchers and instructions of the said moveable

and personal estate, and the writs and evidents of my said heritable estate; And particularly, without prejudice to the said generality, the effects and sums of money which may be contained in any inventory made up and subscribed by me as relative to these presents, and which shall be as sufficient to exclude the necessity of confirmation as if every particular thereof were herein inserted: MOREOVER, I oblige myself and my heirs and successors to infeft and seise the said B., and his heirs and assignees, in the whole lands and other heritage above disponed requiring infeftment; and for that purpose to grant all deeds and conveyances that may be necessary: BUT always with and under the burden of my lawful debts and obligations, payment of my funeral expenses, and of such gifts or legacies as I may think proper to leave, by any deed or writing to be executed by me at any time of my life: And I hereby NOMINATE and APPOINT the said B. to be my sole executor; AND I reserve full power to REVOKE these presents; AND I dispense with the delivery; AND I RESERVE my liferent right; AND I consent to registration hereof for preservation.—IN WITNESS WHEREOF.

3.—GENERAL TRUST-DISPOSITION AND SETTLEMENT.

(*Juridical Styles, 4th Edition, vol. i., p.* 271.)

I, A., in order to regulate the management and distribution of my means and estate after my decease, do hereby DISPONE and ASSIGN to B., C., D., and E., and to such other person or persons as I shall hereafter name, or as shall be assumed in virtue of the powers after written, to act in the trust hereby created, and to the acceptors or acceptor, and survivors and last survivor of the persons hereby named, or to be named or assumed as aforesaid, as trustees for executing the trust hereby created, the majority of the said trustees, while more than two accepting are alive and acting as trustees, being always a quorum; whom all failing, then to the nearest heir-male of the last accepting and surviving trustee, who shall be major at the time (the said trustees named and to be named and assumed, and their foresaids, being throughout these presents denominated "my trustees"); and the assignees of my trustees, heritably and irredeemably; ALL and

SUNDRY, lands and heritable estate, of whatever kind; AS ALSO, my whole moveable and personal means and estate, of whatever kind, which shall belong to me at the time of my death; AND I appoint my trustees my sole executors; AND I oblige myself and my heirs and successors, to infeft my trustees in due and competent form, and to grant all deeds necessary for that purpose; AND I assign the writs, evidents, and title-deeds of my heritable estate: BUT DECLARING that these presents are granted only in trust for the following uses and purposes, viz.—*First*, That my trustees shall, from the produce of my means and estate, pay all my just and lawful debts, and funeral expenses, and the expenses of executing this trust: *Secondly*, That they shall make payment to D., my wife, of the yearly annuity, and other provisions settled upon her by the contract of marriage between us, dated the day of 18 : *Thirdly*, That my trustees shall make payment, at the first term of Whitsunday or Martinmas next after my death, of the following legacies, to the persons after named, viz.—to G. and his heirs, the sum of £ ; to N., the sum of £ ; and to I. and his heirs, the sum of £ , all sterling; and shall also pay all such legacies, gifts, or provisions, and implement all such instructions as shall be contained in any codicil, or any memorandum or writing by me clearly expressive of my will, though not formally executed; declaring that the same, whether formal or informal, shall be held and taken to be part and parcel of these presents: *Fourthly*, That my trustees shall pay to E., my only daughter, the sum of £ sterling; and to each and every other child, whether son or daughter, that may be hereafter procreated of my body, the sum of £ sterling; and which provisions to the said E., and to my other children, shall bear interest from the first term of Whitsunday or Martinmas after my death, and be payable to them, if daughters, on their respectively attaining majority, or being married, whichever of these events shall happen first; and if sons, on their attaining majority; with power, nevertheless, to my trustees, to advance to any son or sons, such part of their provisions as to my trustees shall seem proper for fitting them out in life: BUT DECLARING, That the said provisions to my said younger children (except to the extent paid to them under the power to that effect hereinbefore given) shall not become vested interests in them until the respective terms of payment thereof, but on the death of any of them before such term of payment, the provision to any of them so dying leaving lawful issue, shall be divided equally among

his or her issue alive at the period of my death; and failing such issue, shall belong to my surviving younger children, or their issue, equally among them, *per stirpes:* AND DECLARING FURTHER, That the said provisions to the said E., and to such other children as may be yet procreated of my body, shall be in full satisfaction to them of any share they can demand of the sum of £ sterling, settled by me on the children of the marriage by the foresaid contract of marriage; as also, in full of the other conditional provisions settled by me by the said contract, in case there should be no son procreated of the said marriage: *Fifthly*, That my trustees shall hold the residue and remainder of my estates, particularly and generally above disponed, or of the prices and produce thereof, in trust, for the use and behoof of F., my only son, and the heirs whatsoever of his body; and failing the said F., by his death in minority, without heirs of his body, for the use of the heirs-male that may yet be procreated of my own body, and the heirs whatsoever of their bodies; whom all failing before attaining the years of majority, without lawful issue, in trust, for the said E., my daughter; and failing her before majority, without lawful issue, for the use of the heirs-female that may yet be procreated of my body; BUT DECLARING, That an eldest heir-female shall take in exclusion of her sisters; SECLUDING hereby, in all cases, heirs-portioners: AND in case all the heirs-male or female of my body shall die without lawful issue before attaining majority, then my trustees are hereby directed, on the failure of all such heirs-male or female of my body, to pay over the residue and remainder of my means and estate to such persons as I have already appointed to succeed to me, in the event of failure of the heirs of my own body, or to such persons as I shall hereafter appoint to succeed to me: AND I do hereby DIRECT and APPOINT my trustees, upon the said F.'s attaining the years of majority, or failing him in manner foresaid, any other heir-male or female of my body, in the order above expressed, attaining the years of majority, that they, my said trustees, shall forthwith DISPONE, CONVEY, and MAKE OVER to the said F., and failing him, as aforesaid, in favour of any other heir-male or female of my body, in the order above expressed, on their attaining the years of majority, the said residue and remainder of my means and estate, and all the rights and securities thereof vested in my trustees: As ALSO, I hereby give full power to my trustees to make up and complete, in their persons as trustees foresaid, all proper titles to the lands and estate herein-before disponed, and generally, to the whole lands and other

heritable or real estate, property and effects hereby conveyed, or to which my trustees may at any time have right as falling under the trust hereby created, or to any part or portion of the same, with power to grant leases of the lands and estate hereby conveyed, and of the mines, metals, minerals, and substances therein, or any part or parts thereof, upon such terms and conditions, and for payment of such rents or lordships, and for such endurance, not exceeding nineteen years, as to the lands, and not exceeding thirty-one years as to mines, metals, minerals, and substances therein, as my trustees shall think proper, and to grant such temporary abatements of rents as the circumstances of the times and of the tenants shall appear to render necessary, or such allowances to tenants as my trustees or trustee shall think fit, in respect of expenditure made or undertaken by such tenants for improvements or repairs on their farm or farms, or on the buildings thereon: As ALSO to appoint either one of their own number, or any other person, with or without caution, to be their factor, or agent, or cashier, for uplifting, discharging, and conveying the funds of the trust hereby created, and the securities held by them for the same, and for applying the same to the purposes of the said trust, and to give a reasonable allowance to such factor, agent, or cashier for his trouble: As ALSO, with powers of sale, by public or private bargain, and of compromise and submission; AND, in general, to do or cause to be done everything necessary for the execution of the trust hereby created, and for these purposes to grant, subscribe, and declare all writs and deeds requisite and necessary: AND I HEREBY DECLARE that my trustees shall in no wise be liable for any omissions in management, nor for the omissions and neglect of their factors, agents, or cashiers, nor for the responsibility of them or their cautioners, if caution shall be required, or for the responsibility of the debtors, purchasers, or others with whom my trustees may transact, but that they shall only be bound to act honourably, and shall no wise be liable, *singuli in solidum*, or for one another, but each for himself only, and for his own personal intromissions or wilful default, and no further: And my trustees are hereby empowered, from time to time, to nominate and appoint any person or persons to be a trustee or trustees along with them, or in place of any trustee or trustees who shall die, or desire to be discharged, or refuse, decline, or become incapable to act in this trust; and when and so often as any new trustee or trustees shall be so nominated and appointed, all the trust-estates and effects, heritable and

moveable, real and personal, shall forthwith be disponed and assigned in such form as that the same shall be vested in such new trustee or trustees jointly, with the continuing trustee or trustees, or solely in the new trustee or trustees, in case of there being no continuing trustee, and that for the purposes of this trust, and no otherwise. AND I NOMINATE and APPOINT the said D., and the said B. C., &c., and such other person or persons as may be assumed as trustees aforesaid, and the survivors or survivor of them who shall accept, to be tutors and curators to the said F., my son, and E., my daughter, and to any other child or children that may be yet procreated of my body during their respective pupillarities and minorities; declaring that a majority of the said tutors and curators, accepting and surviving, shall at all times form a quorum: AND I give and grant to my trustees, as tutors and curators foresaid, all the powers competent to tutors and curators by the law of Scotland for managing the estates and effects of minors, hereby declaring that the said tutors and curators shall not be liable for omissions of any kind, or for not doing diligence, or for one another, but each for his own actual intromissions only; AND I reserve full power to REVOKE these presents; AND I DISPENSE with the delivery; AND I reserve my liferent right; and I consent to registration hereof for preservation.—IN WITNESS WHEREOF.

NOTE.—The second purpose of the foregoing style refers to the case where the wife's provisions have been previously regulated by marriage-contract. Where that is not the case, and the wife's provisions have to be settled in the trust-deed, the following clause should be used instead of the one already given :—

Secondly—"I direct my trustees to give to D., my wife, during "all the days of her lifetime, the use of my whole household furni- "ture, bed and table linen, china, silver plate, books, pictures, and "generally of everything useful and ornamental, heirship moveables "included, in and about my dwelling-house at the time of my decease. "AS ALSO, I direct my trustees to secure and make payment to the "said , my spouse, during all the "days of her lifetime, of a free yearly annuity of £ sterling, "payable half-yearly in advance, at Whitsunday and Martinmas, by "equal portions, beginning the first term's payment thereof at the "first term of Whitsunday or Martinmas after my death, for the half-

" year succeeding, and so forth, half-yearly, in all time thereafter " during her life, with a fifth-part more of each term's payment of " liquidate penalty in case of failure, and the legal interest of each " term's payment from the time the same becomes due, and till pay- " ment." (The clause as to children's provisions will be framed to suit the truster's intentions, and thereafter the following clause should be inserted instead of the clause in the style as to the provisions being in full of those settled by the marriage-contract.) " AND DECLARING further, that the liferent annuity hereby granted to " the said D. is in full satisfaction of all claims in any way competent " to her in the event of her survivance, or to her executors or nearest " of kin in the event of her predecease, and that the sums hereby " provided to my children are in full satisfaction of all claims of " legitim or executry competent to them, by or through my decease " in any manner of way."

4.—CODICILS.

1. *Granting new Legacies.*

I, A., in addition to the legacies contained in my last will and testament (or other deed as the case may be), bearing date the (*or if the codicil be written on the back of the will, say*, in addition to the legacies contained in the foregoing testament (or other deed)), Do hereby legate and bequeath to the persons following the sums of money and articles after specified, viz. (*here specify the legacies*): DECLARING ALWAYS that these presents shall noways infer a revocation of my said latter will and testament (*or other deed*), but that the same shall stand in full force with this addition thereto. AND I CONSENT to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation.—IN WITNESS WHEREOF.

2. *Revoking, Restricting, and Adding to Legacies.*

I, A., do hereby REVOKE and RECALL the legacy of £ sterling, bequeathed in the foregoing testament

(*or other deed as the case may be*) in favour of B., and declare the same to be null and void. AND FARTHER, I do hereby RESTRICT the legacy of £ sterling bequeathed to D. to the sum of £ sterling, and revoke and recall the same so far as it exceeds that sum; and in addition to the sum of £ sterling, bequeathed to E., I hereby leave and bequeath to him the further sum of £ sterling, to be paid to him at the same term at which his original legacy is payable (*where the codicil is annexed to the original testament, the clause of registration may be omitted*).—IN WITNESS WHEREOF.

No. XIII.

EXAMPLES OF PETITIONS FOR THE APPOINTMENT OF EXECUTORS.

1.—PETITION for Appointment as General Disponee.

Unto the Honourable the Commissary of Edinburgh, the Petition of A. B., Merchant in Edinburgh;

Humbly Sheweth,—That the late C. D., lately residing in George Street, Edinburgh, died there on the first day of January eighteen hundred and fifty-eight, and had at the time of his death his ordinary or principal domicile in the County of Edinburgh.

That the petitioner is general disponee of the said defunct, conform to trust-disposition and settlement executed by him on 1st June 1857, herewith produced.

May it therefore please your Lordship to decern the petitioner executor-dative *qua* general disponee to the said C. D.

According to Justice, &c.

2.—PETITION for Appointment as General Disponee, combined with Petition for finding as to Domicile.

Uuto the Honourable the Commissary of Edinburgh, the Petition of A. B., Merchant in Edinburgh;

Humbly Sheweth,—That the deceased C. D., lately residing in George Street, Edinburgh, died there on or about the first day of January eighteen hundred and fifty-eight, and had at the time of my death his ordinary or principal domicile in the County of Edinburgh.

That the petitioner is general disponee of the said defunct, conform to disposition and settlement in his favour, executed by the said defunct on 1st July 1856, and which is produced herewith.

That the said deceased left personal property in other parts of the

United Kingdom as well as in Scotland, and the Petitioner is desirous to include in the inventory of his personal estate and effects to be given up in this Court, any personal estate or effects of the deceased situated in England or in Ireland, or both.

That by the "Confirmation and Probate Act, 1858," section 9th, it is enacted, *inter alia*, that "it shall be competent to include in the "inventory of the personal estate and effects of any person who shall "have died domiciled in Scotland, any personal estate or effects of the "deceased situated in England or in Ireland, or in both, provided that "the person applying for confirmation shall satisfy the Commissary, "and that the Commissary shall by his interlocutor find that the de-"ceased died domiciled in Scotland, which interlocutor shall be con-"clusive evidence of the fact of domicile."

May it therefore please your Lordship to decern the petitioner executor-dative *qua* general disponee to the said deceased C. D., and also to find that the said deceased died domiciled in Scotland, and that it is competent to include in the inventory of his personal estate and effects, to be given up in your Lordship's Court, any personal estate or effects situated in England or Ireland, or both; or to do otherwise in the premises as to your Lordship may appear proper.

According to Justice, &c.

3.—PETITION for Appointment as one of the Next of Kin.*

* * * *

That the petitioner is a son, and one of the next of kin of the late C. D.

May it therefore please your Lordship to decern the petitioner executor-dative *qua* one of the next of kin to the said C. D.

According to Justice, &c.

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* The address and first paragraph of all Petitions for Appointment of Executors are in the same terms as prescribed by the schedule annexed to the statute, the only variation being in the paragraph setting forth the petitioner's title, and in the prayer of the petition.

Examples of Petitions for the Appointment of Executors.

4.—PETITION for Appointment *qua* Representative of one of the Next of Kin.

* * * *

That the petitioner is the only son, and, as such, representative of G. D., who was a brother, and one of the surviving next of kin of the said C. D., but who died without expeding confirmation to his estate.

May it therefore please your Lordship to decern the petitioner executor-dative *qua* representative of one of the next of kin to the said C. D.

According to Justice, &c.

5.—PETITION for Appointment *qua* Children of a Predeceasing Next of Kin.

* * * *

That the petitioners are sons of E. D., who was a daughter of the said deceased C. D., but who predeceased her father. That B. D., son and only surviving next of kin of the said C. D., has not claimed the office of executor, and the petitioners are entitled to confirmation.

May it therefore please your Lordship to decern the petitioners executors-dative *qua* children of a predeceasing next of kin to the said C. D.

6.—PETITION for Appointment as Relict.

* * * *

That the petitioner is the widow of the said C. D.

May it therefore please your Lordship to decern the petitioner executor-dative *qua* relict to the said C. D.

7.—PETITION for Appointment as Father.

* * * *

That the petitioner is the father of the said C. D., and has right to one-half of his moveable estate, he having died without leaving issue. That none of the brothers and next of kin of the said C. D. have claimed the office of executor, and the petitioner is entitled to the same.

May it therefore please your Lordship to decern the petitioner executor-dative *qua* father of the said C. D.

According to Justice, &c.

8.—PETITION for Appointment as Mother.

* * * *

That the petitioner is mother of the said C. D., who died without issue, and whose father predeceased him; and she has right to one-third of his moveable estate. That none of the brothers or sisters and next of kin of the defunct have claimed the office of executor, and the petitioner is entitled to the same.

May it therefore please your Lordship to decern the petitioner executor-dative *qua* mother to the said C. D.

According to Justice, &c.

9.—PETITION for Appointment as Brother-Uterine of the Deceased.

* * * *

That the petitioner is the only brother-uterine of the deceased C. D., and the said C. D. having been predeceased by his father and mother, and having died without leaving issue, or any brother or sister-german or consanguinean, or any descendant of a brother or sister-german or consanguinean, the petitioner has right to one-half of

his moveable estate. That none of the next of kin of the said deceased C. D. have claimed the office of executor, and the petitioner is entitled to the same.

May it therefore please your Lordship to decern the petitioner executor-dative *qua* brother-uterine to the deceased C. D.

According to Justice, &c.

10.—PETITION for Appointment as Creditor.

* * * *

That the petitioner is a creditor of the defunct to the extent of one hundred pounds sterling, conform to bill for that sum, dated 11th November 1858, drawn by the petitioner upon, and accepted by the said deceased, and payable three months after date, produced herewith, with interest at the rate of 5 per cent since said bill fell due.

May it therefore please your Lordship to decern the petitioner executor-dative *qua* creditor to the said C. D.

According to Justice, &c.

11.—PETITION for Appointment of a Creditor who has right to a Debt by Assignation.

* * * *

That the petitioner is a creditor of the said defunct for the principal sum of £500, contained in personal bond for that amount by the said deceased in favour of E. F., dated 1st January 1854, to which the petitioner has right by assignation by the said E. F., dated 1st January 1856, and intimated to the said defunct on 10th January 1856, conform to notarial instrument of that date, which bond and assignation and notarial instrument are herewith produced, together with interest thereon at the rate of per cent since the term of last.

May it therefore please your Lordship to decern the petitioner executor-dative *qua* creditor to the said C. D.

According to Justice, &c.

Examples of Petitions for the Appointment of Executors.

12.—PETITION for Appointment as Special Legatee.

* * * *

That the petitioner is a legatee of the defunct to the extent of £100, conform to holograph last will and testament dated 1st May 1857, herewith produced.

May it therefore please your Lordship to decern the petitioner executor-dative *qua* legatee to the defunct.

According to Justice, &c.

13.—PETITION for Appointment as Factor appointed by the Court of Session.

* * * *

That the petitioner is the judicial factor on the estate of the said deceased C. D., nominated and appointed by act and decree of the Lords of Council and Session, dated the 19th March, and extracted the 10th day of April, both in the year 1858, conform to extract act and decree herewith produced.

May it therefore please your Lordship to decern the petitioner executor-dative to the deceased *qua* judicial factor on his estate. According to Justice, &c.

14.—EXTRACT DECREE-DATIVE.

At Edinburgh the twenty-eighth day of April eighteen hundred and fifty-nine—Sitting in judgment the Commissary of Edinburgh. His Lordship, in the action of executry raised before him at the instance of A. B., residing in George Street, Edinburgh, brother and one of the next of kin of the late C. D., who resided at George Street aforesaid, and who died there on 31st December 1858, and had at the time of his death his ordinary or principal domicile in the County of Edinburgh, DECERNED and hereby DECERNS the said A. B. executor-dative *qua* nearest in kin to the said C. D., and assigned next court-day to give up inventory, make faith, and find caution.

Extracted by me, Principal Commissary Clerk of Edinburgh.

(Signed) W. ALEXANDER.

Written by C. O. Collated by M. M. Signed 9th May 1859.

No. XIV.

PETITION FOR RECALL OF DECERNITURE.

Unto the Honourable the Commissary of Edinburgh, the Petition of A. B., residing in Princes Street, Edinburgh, Son and one of the nearest in kin of the deceased D. B., who died at Princes Street aforesaid, on 14th December 1858;

Humbly Sheweth,—That by decree of your Lordship, dated 14th January 1858, the petitioner's mother, Mrs. C. B., was decerned executrix-dative *qua* relict to the said deceased D. B., but no confirmation has as yet been expede in her favour.

That by antenuptial contract of marriage, dated 1st May 1830, between the said D. B. and the said C. B., the right of the said C. B. to any part of her deceased husband's estate was excluded, with the exception of his household furniture, in which she was liferented.

That in these circumstances, and as the petitioner is the only child and next of kin of the said deceased D. B., and has right to the whole of the deceased's moveable estate with the above exception, it is submitted to your Lordship's consideration that it would be more expedient that the petitioner should be appointed to the office of executor, on the estate of his said deceased father.

That a petition for appointment of the said A. B. (the present petitioner) as only executor-dative *qua* nearest in kin to his said father, has been presented to your Lordship in the form and manner prescribed by the statute; but before decree can pass thereon, it seems proper that the previous decerniture in favour of the said C. B. be recalled.

May it therefore please your Lordship to appoint intimation of this petition to be made to the first petitioner, the said C. B., and thereafter to recall the decerniture in favour of the said C. B. as executrix-dative *qua* relict to the said deceased D. B., or to do further or otherwise as to your Lordship shall seem meet.

According to Justice, &c.

No. XV.

PETITION FOR FINDING AS TO DOMICILE, WITH PROOF AND INTERLOCUTORS.

Unto the Honourable the Commissary of Edinburgh, the Petition of A. B., residing in George Street, Edinburgh, Executor nominated and appointed in a Trust-disposition and Settlement, dated 1st January 1859, executed by the deceased C. D., Writer to the Signet in Edinburgh;

Humbly Sheweth,—That the said C. D. died at No. Queen Street, on or about the 31st day of December 1858, and had, at the time of his death, his ordinary or principal domicile in the County of Edinburgh.

That by the said trust-disposition and settlement the deceased conveyed to the petitioner, as his executor, generally all heritable and moveable estate, means, and effects, then belonging, or which should belong to him at the time of his death, and the petitioner is about to enter on the possession and management of his estate.

That the said deceased C. D. left personal estate and effects in other parts of the United Kingdom as well as in Scotland, and the petitioner is desirous to include in the inventory of his personal estate and effects to be given up in your Lordship's Court, any personal estate or effects of the deceased situated in England or in Ireland, or both.

That by the Confirmations and Probate Act, 1858, it is, *inter alia*, enacted that "it shall be competent to include in the inventory of the "personal estate and effects of any person who shall have died domi- "ciled in Scotland, any personal estate or effects of the deceased "situated in England or in Ireland, or both, provided that the person "applying for confirmation shall satisfy the Commissary, and that the "Commissary shall by his interlocutor find that the deceased died "domiciled in Scotland, which interlocutor shall be conclusive evi- "dence of the fact of domicile."

May it therefore please your Lordship to take the premises into your consideration, and to find that the deceased C. D. died domiciled in Scotland, and that it is competent to include in the inventory of his personal estate to be given up in your

Lordship's Court, any personal estate or effects of the deceased situated in England or in Ireland, or both; or to do otherwise in the premises as to your Lordship shall seem proper.

According to Justice, &c.

Interim Interlocutor.

Edinburgh, 2d May 1859.—The Commissary having considered this petition—Appoints the petitioners or their agent to attend within the Sheriff's Office on Wednesday, the 5th May current, at Twelve o'clock noon, to satisfy the Commissary that the deceased died domiciled in Scotland. (Signed) JOHN T. GORDON.

Proof.

At Edinburgh, the fifth day of May eighteen hundred and fifty-nine,

In presence of John Thomson Gordon, Esquire, Commissary of the County of Edinburgh;

COMPEARED E. F., solicitor before the Supreme Courts of Scotland, who being solemnly sworn and examined, depones, I was well acquainted for many years before his death with the deceased C. D., writer to the Signet in Edinburgh, who died at No. Queen Street, Edinburgh, on 31st December last. He was born in Edinburgh, and during the whole period of my acquaintance with him, he resided there. He had no permanent residence elsewhere.

(Signed) E. F.
JOHN T. GORDON.

R. S., merchant in Edinburgh, who being solemnly sworn and examined, depones, I concur with the deposition of the preceding witness *in omnibus*. (Signed) R. S.
JOHN T. GORDON.

Final Interlocutor.

Edinburgh, 5th May 1859.—The Commissary having considered this petition, with the proof adduced—Finds that the deceased C. D., Writer to the Signet in Edinburgh, died domiciled in Scotland, and that it is competent to include in the inventory of his personal estate, to be given up in this Court, any personal estate or effects of the deceased situated in England or Ireland, or both, and decerns.

(Signed) JOHN T. GORDON.

No. XVI.

PETITION FOR RESTRICTION OF CAUTION.

Unto the Honourable the Commissary of Edinburgh, the Petition of A. B., Executor-Dative *qua* Nearest in Kin decerned to the deceased C. D., who resided at No. High Street, Edinburgh, and died there on 14th January 1859;

Humbly Sheweth,—That on 11th February 1859 the petitioner was, by decree of your Lordship, decerned executor-dative *qua* next of kin to the said C. D., and has since prepared and given up (or *now produces*) an inventory of the personal estate and effects of the said deceased, amounting to £300 : 12 : 6, of which the petitioner requires confirmation to be expede.

The petitioner requires to find caution for his intromissions as executor foresaid, before confirmation can be expede; but he is unable to do so to the full amount, not having any friends who are in circumstances to become responsible for the same, and therefore makes this application to your Lordship with a view to have the amount restricted for which the petitioner should find caution.

That, with a few trifling exceptions, the debts left due by the said deceased, together with his funeral and other expenses with which his estate is chargeable, have already been discharged by the petitioner, and that the only parties beneficially interested in the succession of the said deceased are the petitioner and his mother, the relict of the deceased, with whose consent and concurrence this petition is presented.

May it therefore please your Lordship to appoint intimation of this application to be made in such newspapers as to your Lordship shall seem meet, and thereafter to restrict the caution to be found by the petitioner to the sum of £20 sterling; or otherwise to do in the premises as to your Lordship shall seem proper.

According to Justice, &c.

No. XVII.

PETITION FOR APPOINTMENT OF FACTOR.

Unto the Honourable the Commissary of Edinburgh, the Petition of A. B., residing in George Street, Edinburgh, and C. B., residing in Buchanan Street, Glasgow;

Humbly Sheweth,—That D. B., merchant in Edinburgh, died there at No. George Street, Edinburgh, on 21st January 1859, without having nominated executors, or appointed tutors and curators to his children afternamed.

That E. B., wife of the said D. B., predeceased him, and the issue of the marriage are P. B. and R. B., both in pupillarity.

That the said children have not that *status* in consequence of their pupillarity which entitles and qualifies them to administer the personal estate of their said deceased father, and it therefore becomes necessary that a factor be appointed to them for the purpose of managing, ingathering, and administering the personal estate of the said deceased D. B. for behoof of the said pupils and all interested.

That the petitioners are the uncle and aunt of the said pupils, and would respectfully suggest to your Lordship that the said A. B., one of the petitioners, is a fit and proper person to be appointed to the office of factor, he being willing to undertake the duties thereof.

May it therefore please your Lordship to take the premises into consideration, and to appoint the petitioner, the said A. B., factor on the estate of the said deceased D. B. for behoof of the foresaid pupils, with power to him to have himself decerned executor-dative to the said deceased *qua* factor foresaid on his estate, to give up inventory, and expede confirmation in his own name *qua* factor foresaid, and generally, to enter upon the possession, management, and administration of the deceased's estate for the use and behoof of the said pupils, and all others interested therein, on his finding caution for his intromissions with the said estate, and that the same shall be made furthcoming to the said pupils, and all interested, in common form; or to do further or otherwise in the premises as to your Lordship may in the circumstances appear right and proper.

According to Justice, &c.

No. XVIII.

PETITIONS FOR AUTHORITY AND DIRECTIONS TO ISSUE CONFIRMATION.

1.—PETITION for Confirmation *Quoad non Executa.*

Unto the Honourable the Commissary of Edinburgh, the Petition of E. F., Merchant in Edinburgh;

Humbly Sheweth,—That the deceased A. B. died at Edinburgh on the 1st day of May 1850, leaving a trust-disposition and settlement, dated 1st April 1848, wherein he nominated and appointed C. D., whom failing, E. F., to be his sole executor or executors.

That the said C. D. gave up an inventory of the deceased's estate, which, along with the said trust-disposition and settlement, was recorded in the books of your Lordship's Court on 21st, and expede confirmation of the whole estate in his own favour, of date 24th September 1850, and thereafter entered upon the possession and management of the said estate, and proceeded to uplift and transfer the same.

That the said C. D. died on 14th May 1854, without having fully carried out the purposes of the executorship, and leaving part of the executry funds unuplifted; and it is necessary that the petitioner, whose nomination as executor takes effect by the decease of the said C. D., should expede confirmation *quoad non executa*, in order completely to accomplish the purposes of the said last will and testament.

May it therefore please your Lordship to grant warrant and authority to the Clerk of Court to issue confirmation *quoad non executa*, in favour of the petitioner as substitute executor-nominate of the said deceased A. B.; or to do otherwise in the premises as to your Lordship shall seem most proper.

According to Justice, &c.

Note.—The testament-testamentar following on this petition will be in accordance therewith, and Schedule E of the Act.

2.—PETITION for Confirmation where the Validity of the Nomination of Executors founded on is considered questionable by the Commissary Clerk.

The following example is abridged from a Petition presented to the Commissary after a note had been issued by the Commissary Clerk in these terms:—

NOTE by the Commissary Clerk on the Application by A. B. for Confirmation of the estate of the deceased C. D., Merchant in Edinburgh.

The Commissary Clerk has attentively considered the writings, holograph of and signed by the defunct, dated 1st March 1850, containing the alleged nomination of executors. That paper, however, bearing to be "Heads by A. B., Edinburgh, for his last will and "testament," may probably amount only to an expression of intention to make a will; and agreeably to the cases of Munro *v.* Coutts, 3d July 1813 (House of Lords), 1 Dow 437, and Stainton *v.* Stainton, 17th January 1828, is insufficient.

The Commissary Clerk, therefore, does not feel warranted, as Clerk of Court, to issue confirmation, leaving the parties to apply by petition to the Commissary for directions and authority to him to do so.

(Intd.) W. A.

Commissary Office,
Edinburgh, 30th December 1858.

(*Petition.*)

Unto the Honourable the Commissary of Edinburgh, the Petition of A. B., residing at Queen Street, Edinburgh;

Humbly Sheweth,—That C. D., late merchant in Edinburgh, died there on the 1st day of May 1859, and the deponent has lodged an inventory of his personal estate in your Lordship's Court, and craved confirmation as executrix nominated by the said deceased in virtue of a holograph writing by him, dated 1st March 1850, produced along with said inventory.

That the Commissary Clerk has issued a note expressing doubts in regard to the validity and effect of the writing founded on, and

stating that he does not feel warranted to issue confirmation without your Lordship's authority, and therefore the present application is made to your Lordship for authority and directions to him to do so.

The writing which contains the nomination of the petitioner is holograph of and signed by the deceased, and the only objection made by the clerk is, that as the writing bears to be "Heads by A. B., "Edinburgh, for his last will and testament," it may probably amount only to an expression of intention to make a will, and that, agreeably to the cases of Munro *v.* Coutts, 3d July 1813 (House of Lords) 1 Dow 437, and Stainton *v.* Stainton, 17th January 1828, it is insufficient.

But the whole tenor seems to justify the inference that it is a final, and not a deliberative document. (*Here clauses may be quoted.*) And the testator seems to have specially provided for meeting such objections as that made by the clerk of Court, when he says, "I hereby direct "that my share of my father's succession shall be affected by this "writing in the same way as my other property, notwithstanding of "any informalities herein arising from my ignorance of legal forms." It is in virtue of the writing, of which this quotation forms a part, that confirmation is now craved: And the petitioner begs to refer your Lordship to the cases of Gillespie *v.* Donaldson's Trustees, December 22, 1831, 10 S. 174, 7 F. 142; and Magistrates and Town Council of Dundee *v.* Morris (House of Lords) 11th May 1858, Scottish Jurist, v. 30, p. 528.

May it therefore please your Lordship to direct and authorise the Commissary Clerk to issue confirmation in favour of the petitioner as required by him, or to do otherwise in the premises as to your Lordship may seem proper.

According to Justice, &c.

On the petition, of which the foregoing is an abridgement, the Commissary Depute pronounced the following interlocutor, with the accompanying note:—

(*Interlocutor.*)

Edinburgh, 17th January 1859.—The Commissary Depute having considered this petition, with the productions, Directs and authorises the Commissary Clerk to issue confirmation as craved.

(Signed) P. Arkley.

Note.—The Commissary Depute has come to the above conclusion with some hesitation, and entirely approves of the Clerk having declined to grant confirmation without special authority.

(Intd.) P. A.

3.—EXAMPLE of Note of Objections to Validity of Deed by Commissary Clerk.

In this instance the opinion of the Commissary Clerk was acquiesced in by the party making the application.

A.'s Executry.

The Commissary Clerk, referring to his interview with the agent in this case yesterday, and the agent's letter to him of yesterday's date, mentioning various authorities in support of the application for confirmation of the English will of the late A. B., produced along with the inventory of his personal estate, and having looked into the decisions to which the agent has referred him, remains of opinion that the said will is invalid, being that of a party domiciled in Scotland at the time of executing the will, as well as at the time of his death, and the said will being neither holograph, nor tested according to the law of Scotland.

In the case of Ker *v.* Ker's Trustees, 24th February 1829, the writing sustained, although in the English form, was executed in England by a lady who resided there; to the decision in the case of Cameron *v.* Mackie, &c. (Dick's Trustees), 19th May 1831, the same remark applies; and the case of Inglis *v.* Harper, 18th October 1831, does not appear applicable at all to the general question here raised, which is, whether a person having his domicile in Scotland must execute his last will according to the forms established there, or may do so in Scotland according to the forms of the country or countries in which the personal estate which he wishes to convey may happen to be situated.

(Signed) W. Alexander.

No. XIX.

PETITIONS for Warrant and Instruction to the Commissary Clerk to Seal Repositories and Take Possession of Property.

1.—PETITION by a Relative of the Deceased to Seal Repositories.

Unto the Honourable the Commissary of Edinburgh, the Petition of A. B., merchant in Edinburgh, son of the deceased C. D., who resided at No. Princes Street, Edinburgh;

Humbly Sheweth,—That the petitioner's father died this morning at his house, No. Princes Street aforesaid, and the petitioner being uncertain how his affairs may turn out, and whether or not there will be a sufficiency of funds to pay his debts, the present application becomes necessary.

May it therefore please your Lordship to grant warrant to your clerks of Court, or their servants, to repair to the dwelling-house of the said C. D., and to cause seal up his repositories with the seal of Court, to remain thereon until the said C. D. is interred; and thereafter to remove the seals, and to take inventory of what cash, papers, or effects may be found therein; as also to make inventory of the defunct's household furniture and other effects—all in order to confirmation.

According to Justice, &c.

2.—PETITION by a Creditor of the Deceased for Authority and Instructions to the Commissary Clerk to examine the Repositories and take possession of the Defunct's Property, with Minutes of Proceedings thereon, and Minute by Executor-creditor when confirmed for Authority to Clerk to have the estate transferred to him.

Unto the Honourable the Commissary of Edinburgh, the Petition of A. B., Merchant in Edinburgh;

Humbly Sheweth,—That P. H., who resided and carried on busi-

ness as a calotypist in Newington, Edinburgh, died there on the 15th day of July 1858.

That the said P. H. was a native of Hungary, and had no relative or other party in this country to look after his affairs. He occupied a furnished house, the only other inmate of which, besides himself, being a female servant. It is not known whether he left any testamentary writing. His property and effects are nearly all situated in said house, which is at present under the charge of the servant.

On the event of the death taking place, it became necessary that some parties on the spot should make the arrangements required on such an occasion. Accordingly, the petitioner and some other acquaintances of the deceased assembled at his house on the day of his death, and with the assistance of a law agent, the repositories were sealed up. There were put for safety into one of the drawers of the business table in the drawing-room a sum of £70 in bank notes, gold and silver, which had been lying loose, partly in one of the drawers and partly in the deceased's pockets at the time of his death. The door of the drawing-room was then sealed up, and the seal from which the impressions were made, and the key of the drawers of the business table, were handed to the petitioner for safety until the repositories should be opened.

No relation or other party interested in the succession of the deceased has yet appeared, but a meeting of the parties having claims against him was held on 21st July current, to whom the proceedings before referred to were reported, and it was then unanimously resolved that an application should be presented to your Lordship in name of the petitioner, in the terms craved under this application. The minutes of meeting of the creditors, and those taken at the sealing of the repositories, are herewith produced.

The petitioner is a creditor of the deceased in a bill of £50, which will fall due on 8th August next, and the firm of B. and C., of which the petitioner is a partner, have also a claim to the extent of £24 : 8s.

It is necessary to ascertain, by examination of the repositories of the deceased, whether any deed of settlement containing a nomination of executors has been left. In the event of no such nomination being found, it is intended, in accordance with the resolution of the creditors, that the petitioner should apply to be appointed executor-creditor of the deceased, and that he should wind up and distribute the estate in that capacity.

It is also of much importance that in the meantime the money and other valuable property belonging to the deceased should be taken possession of, and placed in safe custody for behoof of all having interest, and subject to the future orders of Court.

May it therefore please your Lordship to grant warrant to the clerk of Court, or any of his deputes or assistants, to open and examine the repositories of the said deceased P. H., and to make an inventory of all the money, papers, property and effects belonging to him, which shall be found in the said repositories, and in the dwelling-house occupied by him as aforesaid; and to take possession of the said money, papers, property, and effects, or such part thereof as it shall appear necessary to remove for safe custody, and to hold the same for all parties interested, and subject to the future orders of Court; and also to examine any papers which may have been so found, and to report whether any of these appear to be testamentary writings, or to contain any nomination of executors, and generally to report his proceedings to your Lordship; and thereafter to grant such further orders for the custody and disposal of the said money, papers, property, and effects as shall appear to your Lordship to be necessary under the circumstances; or to do farther or otherwise in the premises as to your Lordship shall seem proper.

According to Justice, &c.

(*Interlocutor.*)

Edinburgh, 26th July 1858.—The commissary depute having considered this petition, grants warrant as craved.

(Signed) A. J.

3.—MINUTES of the Proceedings under the foregoing Petition.

At No. Salisbury Place, Edinburgh, being the dwelling-house lately occupied by the deceased P. H., Calotypist, on Monday the 26th July 1858, at 6 o'clock P.M., in virtue of a warrant by the Commissary Depute of Edinburgh on a Petition by A. B., Merchant in Edinburgh, a creditor of the defunct, dated same day;

to Seal Repositories and Take Possession of Property.

Present—

W. A., Commissary Clerk of Edinburgh.
J. G., Clerk in the Commissary Office.
A. M., Commissary Macer.
A. B., Petitioner, and H. B. his Agent.

The seals that had been previously affixed to the door of the drawing-room, and to the repositories of the defunct, were examined and found entire.

The repositories of the deceased were then opened by the commissary clerk with the keys delivered up by A. B., and a search made in terms of the prayer of the petition and warrant.

A variety of papers, principally letters, but no writing of a testamentary nature, were found in the repositories, and none of the papers appearing of importance, it was not thought necessary specially to inventory the same, but to leave them where they were found.

Two bank pass-books, the one with the National Bank, and the other with the Commercial Bank, were among the papers, and left as above.

There was also found £71 : 4 : 0 of cash, partly in bank notes and partly in coin, of which the commissary clerk took possession, for the purpose of depositing the same in bank for behoof of all concerned.

A gold and a silver watch were found, also some trifling trinkets and some foreign coins, and these were in like manner taken away by the commissary clerk for safe custody.

A. B. stated that he knew the house had been possessed by the defunct as a furnished house; and a list of the things belonging to the proprietor, Mrs. K., having been found, the commissary clerk, with the approbation of A. B., undertook to have all the other property in the premises, particularly the defunct's photographic apparatus, which appeared to be of some value, a quantity of electro-plate, and a number of calotypes and books, inventoried and valued by a sworn appraiser.

A. B. concurred with the commissary clerk in the propriety of leaving C. H., who had been the servant of the deceased, and appeared a most respectable person, in charge of the house and articles therein in the meantime.

(Signed) W. A.
(,,) J. G.
(,,) A. M.
(,,) A. B.
(,,) H. B.

4.—MINUTE by the Executor-Dative confirmed, to have the Estate delivered over to him.

MINUTE for A. B., Merchant in Edinburgh—in the application at his instance to the Honourable the Commissary of Edinburgh, for warrant to open and examine the Repositories, and take possession of the property of the late P. H., who resided and carried on business as a Calotypist at No. Salisbury Place, Newington, Edinburgh.

S., for the said A. B., stated that on 26th July 1858 warrant was granted to the Clerk of Court, on the minuter's application, to open and examine the repositories of the deceased, and *inter alia* to take possession of the money, papers, property, and effects which should be found therein, or such part thereof as it should appear necessary to remove for safe custody, and to hold the same for all parties interested, and subject to the future orders of Court, and also to examine said papers, and to report whether any of them appeared to be testamentary writings, or to contain any nomination of executors, and generally to report his proceedings.

That accordingly the Clerk of Court, of said date, executed the said warrant, and reported in terms thereof, conform to report in process.

That as it appeared by said report that there was no testamentary writing or nomination of executors by the deceased, the minuter had been decerned and confirmed executor *qua* creditor to him, conform to testament-dative by the Clerk of Court in favour of the minuter, of date 17th current, herewith produced.

That in virtue of the confirmation in his favour, the minuter is entitled to enter into possession of the deceased's estate, and to delivery of his papers; and he now respectfully craves the honourable Commissary to authorise the Clerk of Court to deliver to him such part of the estate, papers, and property as he took possession of, in virtue of the warrant before set forth.

In respect whereof.

Edinburgh, 18*th August* 1858.—The Commissary having considered the foregoing minute, authorises the Clerk of Court to make the delivery craved therein, on receiving a receipt duly stamped for the same. (Signed), &c.

No. XX.

INTERLOCUTORS by Commissaries of Edinburgh in Chalmers' Executry, in regard to Conjoining and Substituting Executors-Dative.

A Petition for appointment of executor was presented by the relict of the defunct. At the calling, the solicitor (Wallace) produced joint-minute by the petitioner and a son of the defunct, setting forth that the said son had a preferable title to the office, and that the petitioner had agreed to his being appointed, and moved accordingly. The Commissary-Depute having made avizandum, pronounced the following interlocutor:—"*Edinburgh, 8th February* 1859.—The Commissary "Depute having considered the petition and joint-minute, refuses to "decern in terms of the minute." (Signed) "P. ARKLEY."—— "*Note.*—The Commissary Depute has considered the point here raised "with every desire to save expense to the parties, but he thinks it "quite impossible to substitute as executor a person different from the "one who presents the petition, whose application has been intimated, "as required by the statute." (Intd.) "P. A." The solicitor for the petitioner appealed against this decision, and craved to be heard by the Commissary, *viva voce*. After the hearing, and having taken the case to avizandum, the Commissary issued the following interlocutor and note:—

"*Edinburgh, 24th February* 1859.—The Commissary having con- "sidered the petition, with the joint-minute relative thereto, and the "appeal against the interlocutor of 8th February current, and having "heard solicitors—Refuses the said appeal; but, *ex proprio motu*, "recalls the terms of the interlocutor aforesaid, and, in lieu thereof, "refuses the said joint-minute as incompetent.

(Signed) "JOHN T. GORDON."

"*Note.*—It is obviously of importance, both for the Court itself, "and for the professional advisers of parties who may come before it, "to fix, as soon and as far as possible, the procedure under the recent "statute. The Commissary will therefore state, as fully and as clearly "as he can, why he has rejected the joint-minute now under consider- "ation. The original petition of Mrs. Betsy Dand or Chalmers,

" craves the Commissary 'to decern the petitioner executrix-dative " 'qua relict to the deceased.' But the joint-minute setting forth the " consent of the original petitioner to the motion, moves the Commis- " sary to substitute the brother of the deceased for her, and to decern " 'the said Alexander Chalmers executor-dative *qua* next of kin of the " 'deceased.' Any such procedure is quite incompetent under the late " Act of Parliament. Nor would this general proposition be contro- " verted, as the Commissary understood the argument addressed to " him, were it not for the reference which the Act itself makes to " what was competent prior to its date. Now the words of the Act " are, that the petition for the appointment of an executor 'may be " 'called in Court, and an executor decerned, *or other procedure may* " '*take place, according to the forms now in use in case of edicts of* " '*executry, and with like force and effect.*' It is maintained, there- " fore, that, when all the requirements of the recent statute have been " observed in bringing the original petition into Court, it is competent, " after it is called in Court, to fall back, if it is necessary or expedient, " upon the forms of procedure previously in use. But this argument " ignores a vital difference between the very first step of the old " and new procedure. It was certainly the practice under the old " forms to decern anybody executor whom the Commissary might be " moved so to decern. And why? Because the old form of petition " craved only *in generalibus* that an executor or executors might be " appointed. The new procedure makes any such petition impossible. " The original petition now must 'name and design' the petitioner " for the appointment. The Commissary, accordingly, under the old " form, did not transgress any legal power by ultimately appointing " anybody as executor, because the nomination of the individual was " not an essential component part of the original petition. The nomi- " nation of the individual seeking the office of executor is an indis- " pensable requisite of the new petition. The Court dares not go " beyond the limits of what it may be craved to do in each case. . No " Court whatever can do so. Except it may be in instances, which " are not, of course, apposite here, where everybody who has or can " have any interest in the matter appears and consents to what the " Court shall do. Taking this broad and fundamental objection to " the competency of the procedure which has been tried in the present " case, it is not necessary for the Commissary to rest his judgment at " all on the perils, though they are manifest enough to public and

" private interests, by commingling an old and a new procedure. The " fusion cannot take place—in a case, at least, like the present— " because the new form has no door to let the old come in. The old " form, in fact, let in anybody and everybody up to the last moment, " while the new form, from the first moment, shuts out everybody " except the party or parties named and designed by and within itself. " The Commissary must not, of course, be understood to aver that no " petition, under the old procedure, ever specified, *in gremio*, the par- " ticular party seeking the office of executor. There were plenty of " such petitions. But it will be found that, except *per incuriam*, " substitutions were never allowed under such special petitions. It is " not, probably, the province of the Court to dictate any procedure in " the abstract; but as it is the anxious wish of the Commissary to " elucidate the statute, in so far as he can, for the public service, he " does not hesitate to state as his opinion, that, under circumstances " like the present, when a substitution is desirable and agreeable to " those having the nearest interest, it will be proper to present a new " petition, which must submit to all the statutory requirements of an " original petition, in the name of the new petitioner alone. Upon this " petition there may be subscribed, or along with it there may be pre- " sented, a minute expressing the consent of the first petitioner that " the new petition shall be granted. The Commissary will then be " enabled to grant the new, and to refuse the original petition, quite " within the forms and powers of the recent statute.

(Intd.) " J. T. G."

A new petition having been presented, and intimated in the usual manner, and also to the first petitioner, in compliance with the 5th section of the recent Act, it was called on 22d March 1859, when the following final interlocutor was pronounced :—" *Edinburgh, 22d March* " 1859.—Wallace moved that this petition should be conjoined with " the petition at the instance of the relict, and that in the conjoined " process the Honourable Commissary should appoint the petitioner " Alexander Chalmers executor-dative *qua* next of kin of the deceased. " The Commissary conjoins the processes; DECERNS the petitioner " Alexander Chalmers executor-dative *qua* next of kin of the defunct, " and assigns next court-day to give up inventory, make faith, and " find caution; and refuses the prayer of the petition of Mrs. Betsy " Dand or Chalmers. (Signed) " P. ARKLEY."

Average Annual Number of Edicts in the Various Commissariots in Scotland.

No. XXI.

STATEMENT shewing the Annual Number of Edicts for the Appointment of Executors issued by the Commissary Clerks in all the Counties in Scotland.

Counties.	Average Number of Edicts in three Years.	Counties.	Average Number of Edicts in three Years.
Aberdeen	130	Brought forward	849⅓
Argyll	26⅔	Kinross	4⅔
Ayr	60⅔	Kirkcudbright	29⅓
Banff	33	Lanark	187
Berwick	9	Linlithgow	12
Bute	9⅓	Nairn	4⅓
Caithness	14⅔	Orkney	8⅔
Clackmannan	7⅔	Shetland	6⅓
Dumbarton	9⅔	Peebles	2⅔
Dumfries	54⅔	Perth	89⅓
Edinburgh	236⅔	Dunblane	13⅓
Elgin or Moray	23⅔	Renfrew	63⅓
Fife, Cupar	64	Ross and Cromarty	20
Dunfermline	8⅓	Roxburgh	21⅔
Forfar	86	Selkirk	1⅓
Haddington	23	Stirling	47
Inverness	30	Sutherland	5
Kincardine	22⅓	Wigtown	16
Carry forward	849⅓		1381⅓

Inventory Duty paid in the Various Commissariots in Scotland.

No. XXII.

LIST of DUTIES paid on Inventories recorded in each of the Counties of Scotland during 1857.

County.	Duty.			County.	Duty.		
	£	s.	d.		£	s.	d.
Aberdeen	5,224	10	0	Brought forward	52,498	2	6
Argyll	1,361	0	0	Kincardine	567	10	0
Ayr	4,654	10	0	Kinross	161	10	0
Banff	1,125	10	0	Kirkcudbright	646	10	0
Berwick	1,198	0	0	Lanark	17,901	0	0
Bute	236	0	0	Linlithgow	964	0	0
Caithness	546	10	0	Orkney	147	10	0
Clackmannan	642	0	0	Peebles	600	0	0
Dumbarton	884	0	0	Perth	7,014	10	0
Dumfries	2,897	10	0	Renfrew	4,332	0	0
Edinburgh	22,074	10	0*	Ross and Cromarty	619	10	0
Elgin and Nairn	1,407	10	0	Roxburgh	1,236	0	0
Fife	3,554	0	0	Selkirk	578	0	0
Forfar—				Stirling	1,961	10	0
Dundee, £2263 : 10s. / Forfar, £2176	4,439	10	0	Sutherland	112	0	0
				Wigtown	659	10	0
Haddington	898	10	0	Zetland	68	10	0
Inverness	1,354	12	6				
				Total	90,067	12	6
Carry forward	52,498	2	6				

* Whereof by parties domiciled in Mid-Lothian . . £17,784 10 0
Furth of Scotland . 4,290 0 0

£22,074 10 0

No. XXIII.

REASONS for Society of Writers to the Signet, Edinburgh, in support of the Confirmation of Executors &c. Bill, *as brought into Parliament by the Lord Advocate, and Amended in Committee, and* AGAINST *the Alterations made on the Bill on Re-commitment.*

The Society of Writers to the Signet and the Society of Solicitors before the Supreme Court, who form the principal bodies of Legal Practitioners in Edinburgh, unanimously approved of the principle of this Bill as it originally stood, the principal objects of which were—1st. To improve the form and mode of decerning and confirming executors in Scotland. 2d. To supersede the necessity of Scotch Executors expeding letters of administration and probates in England and in Ireland, as well as taking out confirmations in Scotland. 3d. To supersede the necessity of English and Irish Executors expeding confirmations in Scotland, as well as taking out letters of administration or probates in London or in Dublin; and 4th. To admit of the executors of deceased persons dying in any part of Scotland to apply for confirmation either to the Sheriff Commissary of the particular county in Scotland in which they had their domicile at the time of their death, or to the Commissary Court in Edinburgh as a *commune forum* for all Scotland, in place of being restricted as formerly to the County Court.

That the three first objects have been retained in the Bill as passed by the House of Commons, but the fourth was expunged on a re-commitment, and at the last stage of discussion. That the 3d Clause of the Bill, before re-commitment, stood thus: "Such Petition shall be "presented to the Commissary of the county wherein the deceased "died domiciled, or, *in the option of the Petitioner, and* in the case of "persons dying domiciled furth of Scotland, or without any fixed or "known domicile, having personal or moveable property in Scotland, "to the Commissary of Edinburgh;" but the words printed in italics have unexpectedly been struck out.

Reasons for Alterations on the Confirmation of Executors Bill.

The reasons in favour of an option being conferred on the representatives of deceased persons are—

1st. In the analogous case of the Service of Heirs to real property in Scotland as regulated by the Service of Heirs Act 10 and 11 Vict. cap. 47, sec. 3, it is provided that petitions for general service "shall "be presented to the Sheriff of the County within which the deceased "had at the time of his death his ordinary or principal domicile, *or*, "*in the option of the Petitioner*, to the Sheriff of Chancery" at Edinburgh, and in case of special services, that the "Petition shall be pre-"sented to the Sheriff within whose jurisdiction the lands or other "heritages are situated, *or*, *in the option of the Petitioner*, to the "Sheriff of Chancery" at Edinburgh.

2d. By the Probate and Letters of Administration (England) Act, 1857, and by the Probate and Letters of Administration (Ireland) Act, 1857, the representatives of persons dying in England and in Ireland have the option of applying for Probate and Letters of Administration, either to the District Court or Superior Courts in London and Dublin respectively.

3d. It would frequently be a matter of great convenience to executors, who are either themselves or their agents resident in Edinburgh, if they had the option of giving up the inventory of a personal estate in the Commissary Court of Edinburgh; and the unnecessary publicity of the affairs of private individuals attendant upon the registration of inventories in a record kept in a provincial town has been felt a grievance, which the option originally given in the Bill would remove. The privilege of recording deeds, instruments of sasine, protests of bills, inhibitions, &c., either in the Local Registers, or in the General Register at Edinburgh, at the pleasure of the ingiver, has long prevailed, and has proved a great accommodation to the public.

4th. In the same spirit of consulting public convenience, the "Bankruptcy (Scotland) Act, 1856," abolished the exclusive jurisdiction of the Court of Session in awarding sequestrations, and gave parties the option of applying for sequestration either to the Court of Session or to the Sheriff of the county.

5th. By establishing Edinburgh as a *commune forum* for all Scotland, an end would be put to the questions that are frequently arising from the difficulty of ascertaining in what particular county in Scotland persons die domiciled, and whether persons dying out of Scotland

acquired a domicile abroad, in which case they fall to expede confirmation in Edinburgh, or retained a domicile in some other county in Scotland, in which case the Commissary of that county would have the jurisdiction, unless the option sought is granted by the Bill, and a *commune forum* for all Scotland established.

The following Clause, which was number 20 of the Bill, was also struck out on re-commitment, and should, if the option above contended for is granted, it is humbly submitted, be restored, in place of giving the Society of Solicitors before the Sheriff Court of Edinburgh, who are composed of about thirty-five individuals, the exclusive privilege of the extended practice that would be introduced into that Court.

" It shall be lawful for all agents, duly qualified to practise before " the Court of Session, to practise in the Commissary Court of Edin- " burgh, in so far as relates to any of the proceedings authorised by " this Act, provided that they shall not be entitled to payment of any " higher fees than those legally exigible in such Court.

" JOHN B. GREIG,
" *Agent for the Society of Writers to the Signet.*"

18 Abingdon Street, Westminster,
30th June 1858.

Act to amend the Confirmation and Probate Act, 1858.

ADDENDUM.

ACT 22D VICTORIA, CAP. 30,

INTITULED

An ACT to amend the "Confirmation and Probate Act, 1858." [19th April 1859.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Persons, &c. making Payments upon Confirmations and Probates under Act 1858, to be indemnified.

I. All Persons and Corporations who, in reliance upon any Instruments purporting to be a Confirmation granted under the "Confirmation and Probate Act, 1858," and all Persons and Corporations who, in reliance upon any such Instrument which may be sealed under the Authority of the said Act with the Seal of the Principal Court of Probate in *England* or of the Court of Probate in *Dublin*, and all Persons or Corporations who, in reliance upon any Instrument purporting to be a Probate or Letters of Administration granted by the Court of Probate in *England* or Court of Probate in *Dublin*, and having endorsed or written thereon a Certificate by the Commissary Clerk of *Edinburgh*, in the Form in the said Confirmation and Probate Act prescribed, shall have made or permitted to be made, or shall make or permit to be made, any Payment or Transfer *bonâ fide* upon any such Confirmation, Probate, or Letters of Administration, shall be indemnified and protected in so doing, notwithstanding any Defect or Circumstance whatsoever affecting the Validity of such Confirmation, Probate, or Letters of Administration.

Short Title.

II. This Act may be cited as the "Confirmation and Probate Amendment Act, 1859."

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